

THE
CALCUTTA LAW JOURNAL.
REPORTS OF CASES
DECIDED BY THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL ON APPEALS
FROM INDIA
AND
BY THE HIGH COURT OF JUDICATURE
AT FORT WILLIAM IN BENGAL.

Vol XXIV.

1916.

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JUDGES OF THE HIGH COURT.

1916.

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PRIVY COUNCIL.

PRESENT :—*Viscount Haldane, Lord Parmoor, Lord Wrenbury
and Mr. Ameer Ali.*

SRIMATI NRITYAMONI DASSI AND OTHERS

v.

LAKHAN CHUNDER SEN AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL].

*Limitation, suspension of—Plaintiffs litigating for their rights in a previous suit
wherein they were defendants.*

A Hindu of Calcutta died intestate leaving three sons B. M., M. M., and C. L., of whom the last named died in 1881 leaving sons. On and from the 18th January, 1892 B. M. collected the rents and issues of certain property to the exclusion of M. M., and the sons of C. L. On the 21st December, 1896 the sons of C. L. instituted a suit against B. M., and M. M. for their share in the property. In 1897 on the death of B. M., and M. M. their sons were brought on the record. The sons of M. M. supported the sons of C. L., and asked that their rights and interests might also be declared in that suit, and a distinct issue was framed in respect of their claim. The Court decreed the claims of the sons of C. L., and made a similar decree in favour of the sons of M. M. On appeal the decree in favour of the sons of C. L. was affirmed, but that in favour of the sons of M. M. was set aside on the 22nd February, 1904. Thereupon, on the 14th November, 1904 the sons of M. M. brought the present suit against the sons of B. M. and C. L. for their share in the said property :

Held, that limitation began to run against the plaintiffs on the 18th January 1892, but that it remained in suspense whilst they were *bona fide* litigating for their rights in the suit brought by the sons of C. L., and consequently the suit was not barred by limitation.

Lakhan Chunder Sen v. Madhusudan Sen (1) affirmed.

Held, that the appellate Court ought not to have set aside the decree in favour of the defendants, but ought to have exercised its powers under the Civil Procedure Code of 1882 by transposing them from the category of defendants to that of plaintiffs and thereby maintained the decree of the primary Court.

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In cases where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came. If, however, owing to the distance of time it is hardly likely that evidence would be forthcoming on either side to establish or rebut conclusively the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts.

So long as a deed of covenant does not purport to transfer and is not intended to transfer any right in the immovable property comprised therein and is only resorted to as a device for deceiving creditors and sheltering the property dealt with thereunder from their reach, it will not alter the title of the covenantor to the property covered by it, even though it may contain a recital falsely acknowledging the right, which never existed, of the covenantee to the said property. Nor will such a deed be valid as a family settlement.

The first of these two consolidated appeals was by way of appeal from a judgment of the Appellate Bench of the High Court at Calcutta, dated the 25th day of January 1909 in an action No. 826 of 1904 whereby the said Court reversed the judgment of Mr. Justice Chitty in the same Court, dated the 15th day of June 1908 and gave judgment in favour of the plaintiffs now some of the respondents; the second of these consolidated appeals was by way of appeal from a judgment of the Appellate Bench of the said High Court, dated the 11th day of December 1908 in an action No. 16 of 1905 whereby the said Court confirmed the judgment of the second Court of the Subordinate Judge of 24-Pergunnahs, dated the 29th day of December 1906 except as to a small portion of the property the subject matter of the action not now the subject of appeal and save as aforesaid gave judgment in favour of the plaintiff now one of the respondents.

The facts are fully stated in the judgment of their Lordships.

For a report of the judgments of the Courts below on the question of limitation see I. L. R. 35 Calc. 209, 7 C. L. J. 59, where also the facts material to point are stated.

De Gruyther, K. C., and Ross, K. C., for the Appellants.

Sir William Garth, and E. F. Spence, for the Respondents.

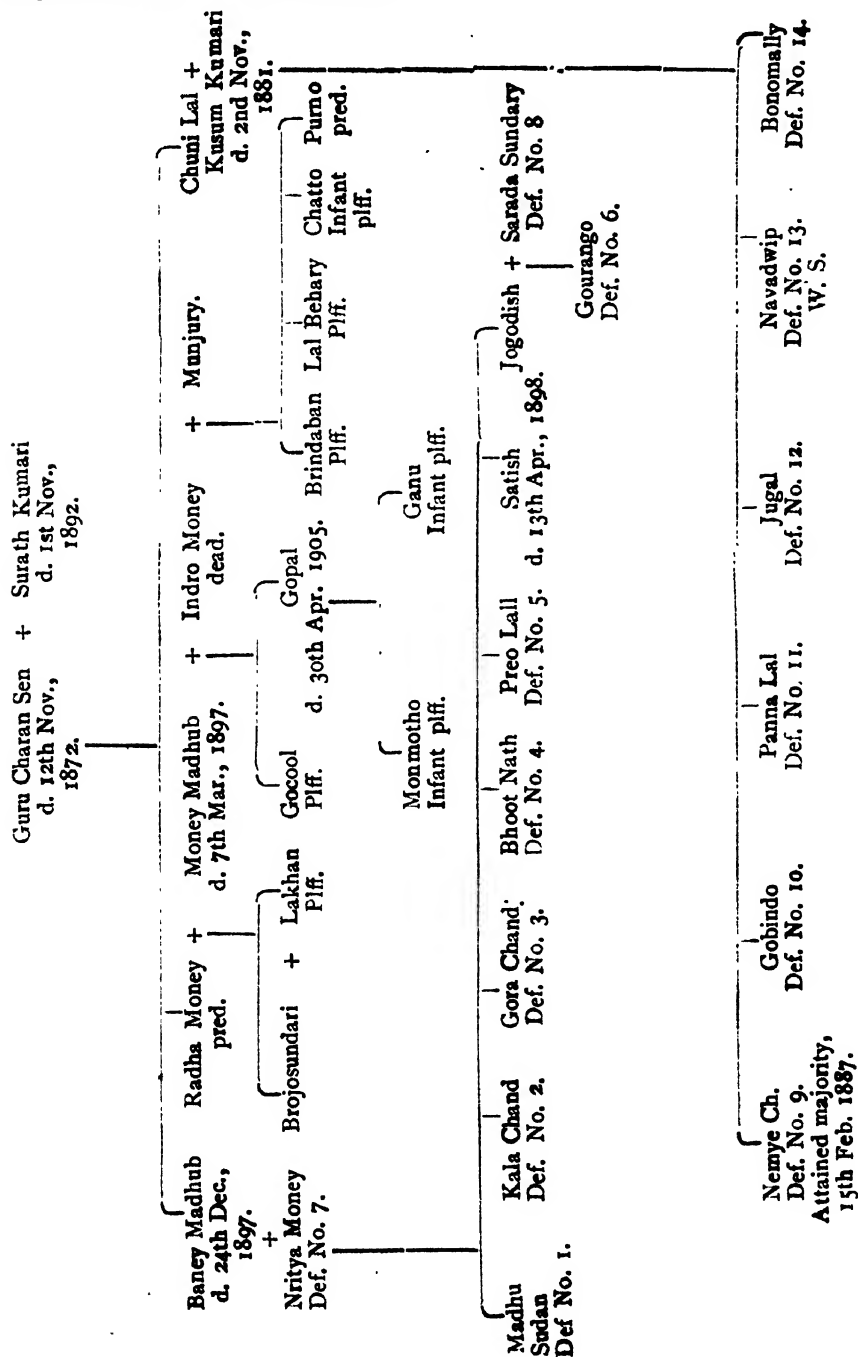
The judgment of their Lordships was delivered by

Mr. Ameer Ali.—The two suits which have given rise to the present appeals were instituted, one in November 1904 in the High Court of Calcutta, in its ordinary original civil jurisdiction, the other in the Court of the Subordinate Judge of the district of 24-Pergunnahs, in Bengal.

The parties to this protracted litigation, with the exception of the appellant Nrityamoni Dassi and the other female defendants, are the descendants of one Guru Charan Sen, a Hindu inhabitant

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of Calcutta, who died in the year 1872, leaving him surviving three sons named respectively Baney Madhub Sen, Money Madhub Sen, and Chuni Lal Sen, and a widow, Surath Kumari Dassi. The appellant is the widow of Baney Madhub who died in 1897. The following genealogical table will explain the relationship in which the parties stand to one another :—



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Guru Charan Sen appears to have been during the period of his life a very wealthy man, and was possessed of considerable house property in Calcutta, besides some lands in the village of Panibati in the district of Nuddea. Among the house property were eight houses situated in Banstollah Street and its vicinity, which, for the sake of brevity, may be conveniently referred to in this judgment as "the eight houses." Besides these and several others which need not be specifically mentioned, he owned 102, Cotton Street and 27, Burtollah Street.

Between 1855 and 1857 Guru Charan Sen became heavily involved in debt, one of his principal creditors being James Church, junr., and Co., to whom he had apparently been a *banian*. Early in 1857 he appears to have executed in their favour a bond by which he hypothecated, among other property, "the eight houses," subject to certain prior encumbrances created in favour of one Shama Charan Mullick, to whom also he was heavily in debt; and in a suit brought immediately thereafter on the bond he confessed judgment. Thereupon, on the application of another creditor, Guru Charan Sen was adjudicated an insolvent and all his property vested in the Official Assignee. This was followed by a suit at the instance of Shama Charan Mullick in respect of his debt. The Official Assignee then brought his action to get the insolvent's properties into his hands. All three suits were referred to arbitration, and under the award made in those proceedings Shama Charan Mullick obtained priority. The Official Assignee, in accordance with the directions contained in the award, sold most of the houses belonging to the insolvent, inclusive of 102, Cotton Street and 27, (now numbered 34), Burtollah Street. But for some unexplained reason the "eight houses" never came into the possession of the Official Assignee; and, although the award contained a direction to that effect, it is now admitted they were never brought to sale. These eight houses unquestionably belonged to Guru Charan Sen, subject, it is said, to certain payments out of the rents and issues for the maintenance of two idols, and he appears to have retained possession of them until his death in November 1872, when his three sons succeeded to the same. No application, however, for the substitution in the Collector's Register of their names as owners in place of their father was made until 1877, when they were recorded as *shebaitis*, the ordinary designation for a person holding property dedicated for, or charged with, the maintenance in any way of Hindu religious worship. But it is not disputed that the income arising from the eight houses—save as to a small

portion which was spent for keeping up the two family idols—was applied towards the general expenses of the joint family.

Chuni Lal, the third son, died in 1881, leaving a widow, named Kusum Kumari Dassi, and several sons, of whom Nemye Charan is the eldest. But his death made no difference in the mode of dealing with the income of the eight houses or in the general condition of the family, which was that of an ordinary Hindu joint family, of which Baney Madhub, the eldest male member, was the *karta*.

This state of things continued until 1891, when the events took place which gave rise to the litigation of 1896 and also form the subject of the present dispute.

As already stated, 102, Cotton Street, and 27, Burtollah Street also belonged to Guru Charan Sen. These were put up to sale by the Official Assignee. One was purchased by Shama Charan Mullick, the other by one Heera Lal Seal for Shama Charan Mullick, and to whom Heera Lal appears to have afterwards transferred it by deed. Why this devious course was adopted in respect of these houses is a matter of inference. Shama Charan Mullick is also stated to have bought up the claims of most of the other creditors. In 1861 he conveyed 102, Cotton Street, and 27, Burtollah Street, to Surat Kumari Dassi, the wife of Guru Charan Sen; and one of the main questions in the present litigation is whether she took them as absolute owner or merely *benami* for her husband and the joint family, of which he was the *karta* and the head.

Between 1888 and 1890 the two brothers Baney Madhub and Money Madhub found themselves heavily involved in debt: their *banianship* business had brought them no profit; Money Madhub had already suffered imprisonment for debt, and evidently the creditors were pressing their demands. To add to these difficulties, differences and disputes had commenced in the family chiefly owing to the indebtedness of the two brothers; whilst the mother, Surat Kumari Dassi, in whose name, either as absolute owner or in trust for the family, some of the properties stood, was getting very old. The sons of Guru Charan Sen had before them the fate of their father, who, though he had no doubt contrived to save some part of his possessions from the general wreck of his fortunes, had died an undischarged bankrupt. It is easy in these circumstances to imagine why it was considered advisable by the principal adult members to devise some method to shelter the family properties remaining in their hands from their creditors. It is not clear whether Baney Madhub was the prime mover in evolving the

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scheme, as was alleged afterwards by Money Madhub, but both took an equal part in carrying it out. This was indubitably, it might be said admittedly, the motive cause for the execution of the documents, with the nature and effect of which their Lordships have to deal in these two appeals.

Early in 1891 a solicitor of the name of Netye Dass Dey was instructed to draw up certain deeds by which Baney Madhub, Money Madhub, and the representatives of Chuni Lall were to transfer absolutely the "eight houses" to Surat Kumari Dassi, who on her side, in consideration thereof, was to convey in three separate parcels the houses which stood in her name. 102, Cotton Street, the large family residence of Guru Charan Sen, had by this time become divided into three separate premises bearing separate municipal numbers—115, 116, and 117, Cotton Street—the first being occupied as the joint family dwelling-house. Another house, No. 111, had been acquired, in the name of Surat Kumari Dassi, and was added wholly or partly to the *boitak-khana*, or male reception-room, of No. 115.

To resume the narrative of events leading to the litigation in which the family has been involved since 1896, Netye Dass Dey carried out his instructions and drafted the required deeds. Evidently these were not considered sufficient to answer the object in view, and another well-known solicitor of the Calcutta High Court, named Mr. Nemye Charan Bose, was consulted on the subject, and he appears to have been of opinion that the projected transfer of the "eight houses" to Surat Kumari could not be sustained against the claims of the creditors. He accordingly prepared another deed, which was approved, and on the 30th June, 1891, Baney Madhub and Money Madhub executed this document, called by the parties in these proceedings "the deed of covenant," by which they disclaimed all right to and interest in the eight houses, and acknowledged that their mother, Surat Kumari Dassi, was the real owner, and that they had been realising the rents of this property on her behalf. They further stated that, as she was desirous of taking over its charge herself, and in consideration of her not demanding an account from them of their stewardship, they were making this declaration in her favour. Nemye Charan Sen, the eldest son of Chuni Lall, who was *sui juris* at the time, did not join in the deed, though he witnessed it. There is no suggestion of any kind in this document that the "eight houses" were *debutter*.¹

On the same day, *viz.*, the 30th June, 1891, they executed another document, by which they substituted their mother as trustee

in their stead in respect of a Government of India promissory note for a sum of 5,000 rupees held by the Official Trustee, and of certain lands in the village of Agarpara which had vested in them under a trust deed executed by their grandmother, Surjumoney Dassi, the mother of Surat Kumari.

By the same deed they assigned or purported to assign to her the sole management of the ancestral lands at Panihati, over part of which their grandfather, Bissumber Sen, the father of Guru Charan, had erected a dwelling-house and a *thakoorbari* (temple), where he had placed two family idols. This property was held by Guru Charan during his life, and on his death had devolved on his sons. In the document under reference it was recited that the management of the temple and of the worship was conducted by them until then in conjunction with their mother.

Contemporaneously with these two deeds, Surat Kumari executed three separate "deeds of gift" ; by one she gave to Nrityamoni Dassi, the wife of Baney Madhub, in trust for herself and her sons, 116, Cotton Street ; by the other, 117, Cotton Street and 34, Burtollah Street to Kusum Kumari Dassi, the widow of Chuni Lall, and "her sons and grandsons" in succession ; and by the third, No. 111, Cotton Street to Baney Madhub.

On the 27th July, 1891, she executed in favour of Munjuri Dassi the wife of Money Madhub, of his two sons by a predeceased wife, and of Brajo Sundari Dassi, the wife of his eldest son, Lakhan Chander Sen, a deed of gift in respect of 115, Cotton Street.

She thus allotted to the three branches of the family the property which under the transfer by Shama Charan Mullick stood in her name, and to which, according to the appellant's case, she was absolutely entitled. The reason why the gifts were made to the female members of the three branches is obvious. The object plainly was to avoid the possibility of the houses in question being attached and sold at the instance of the creditors of Guru Charan's sons.

It is to be observed that parts of all three houses appear to have been let out to tenants, and that although No. 115 was allotted to Money Madhub's branch, Baney Madhub's family, with Surat Kumari, continued to reside there for some time at least, though in 1892 Nrityamoni herself, with her mother-in-law, Surat Kumari, appears to have moved to Panihati.

On the 18th January, 1892, Surat Kumari executed a deed of trust, by which she dedicated the "eight houses" to the worship of certain idols named therein, and appointed Baney Madhub, his wife Nrityamoni, and Saroda Sundari Dassi, the widow of one of his sons

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then deceased, as trustees of the endowment she purported to create by this document. From this time, it is clear, Baney Madhub began to collect the rents and issues of the "eight houses" to the exclusion of the other two branches. The rent receipts are headed "Estate of Surat Kumari Dassi," and are signed by him for himself and his co-trustees. Bitter disputes naturally sprang up in the family, which finally led to the institution of a suit in the High Court of Calcutta in its original civil jurisdiction on the 21st of December, 1896, by the sons of Chuni Lall other than Nemye Charan Sen against Baney Madhub, Money Madhub, Nriyamoni Dassi and Saroda Sundari Dassi. As Nemye had attested the "deed of covenant" he was joined as a defendant. Their mother, Kusum Kumari was made a party after the action was launched.

The plaintiffs charged that the statements in the "deed of covenant" of 1891 were wholly false; that Surat Kumari had no title or interest whatsoever in the properties to which it related; that it was concocted with the object of sheltering the "eight houses" from the creditors of Baney Madhub and Money Madhub; that Surat Kumari had no right to dedicate the said houses; and that the "deed of covenant," together with the deed of trust of the 18th January, 1892, were wholly inoperative against them and did not affect their rights in the properties in question. And they asked that their share and the share of their brother, Nemye Charan, may be ascertained, and the "nature and extent of their right may be declared."

Money Madhub did not enter any defence, but in an affidavit relating to the discovery of documents in his possession, made on the 1st May, 1897, he alleged that he had executed the "deed of covenant" under the undue influence of Baney Madhub and Surat Kumari Dassi, both of whom had assured him that, under the arrangement, all the sons and representatives of Guru Charan Sen would remain in possession of the "eight houses," and that he had no intention of defrauding his creditors, or depriving the sons of Chuni Lall of their rights in the said properties.

Money Madhub died during the pendency of the suit, and his sons were substituted in his place, and Munjory Dassi was brought on the record as the mother and representative of her son Poorno, who had died after Money Madhub.

The sons of Money Madhub, whilst repudiating the charges made against their father, associated themselves with the claim made by the plaintiffs in that suit, and asked that their rights and interests might also be declared in those proceedings. The contesting

defendants, Baney Madhub, Nirtyamoni and Sarodā Sundari filed a joint written statement in which they traversed the main allegations of the plaintiffs regarding the object with which the documents referred to were executed in 1891. With respect to the property in dispute, they admitted that it belonged originally to Guru Charan Sen, but they alleged that it was assigned by him to James Church, junr., and Co. in satisfaction of their claim, and that Shama Charan Mullick purchased the same from them with monies belonging to and paid to him by Surat Kumari Dassi, that Shama Charan Mullick also bought at the Official Assignee's sale, 102, Cotton Street and 27, Burtollah Street, and subsequently transferred all the houses to Surat Kumari, who held them ever since in her own right as absolute owner, consideration for the transfer, in this instance also, being paid by her with her own money.

Baney Madhub died before trial, and his sons were brought on the record as his heirs and representatives. Some of them filed separate written statements in which the allegation about the purchase of the "eight houses" is put somewhat differently, but the variation does not affect the real defence, viz., that the houses were the absolute property of Surat Kumari, acquired with her own money.

The suit came for trial before Mr. Justice Henderson, of the Calcutta High Court, who, after an exhaustive examination of the evidence, held in substance that the "eight houses" never belonged to the mother; that they all along remained the property of Guru Charan Sen, and devolved, on his death, on his three sons; that the "deed of covenant" executed in 1891 was merely with the object of sheltering the "eight houses" from their creditors; and that neither that document nor the deed of trust of the 18th January, 1892, affected the rights and interests of the plaintiffs or of the representatives of Money Madhub. He accordingly decreed the claims of the plaintiffs in that suit. He made a similar decree in favour of the sons of Money Madhub.

On appeal, the High Court in its appellate jurisdiction, affirmed the findings of Henderson J., so far as the "eight houses" were concerned, and affirmed his decree in favour of the plaintiffs in that suit, viz., the sons of Chuni Lall, other than Nemye Churn, but differed from him in the opinion he had incidentally expressed regarding the right of Surat Kumari in 102, Cotton Street and 27, Burtollah Street, which was not directly in issue in that case. With regard to the claim of Money Madhub's sons, the learned Judges considered that as they were defendants Mr. Justice Henderson's decree in their

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favour could not be maintained. They accordingly varied his decree in that respect, and relegated them to a fresh suit for the relief to which they were clearly entitled. It was unfortunate that the learned Judges did not exercise the power which they possessed under the Code of Civil Procedure, to transpose the sons of Money Madhub from the category of defendants to that of plaintiffs, and to maintain Mr. Justice Henderson's decree in their favour. Had they done so they would have spared this family another ten year's litigation. The mistake was purely technical and could have been set right by a small amendment without the parties resorting to a fresh suit.

The appellate decree was made on the 22nd February, 1904, and on the 14th November of the same year Lakhan Chunder Sen and his brothers, the sons of Money Madhub, brought the present suit, 826 of 1904, in the High Court of Calcutta, in its ordinary original civil jurisdiction, for the assertion of their rights to a one-third share in the "eight houses" which had devolved on their father on the death of Guru Charan.

The allegations and charges in the plaint are, like the defence, substantially the same as in the previous suit. The appellant Nrityamoni Dassi, who was the real contesting defendant, raised a further plea that the suit was barred under the statute of limitation.

The case was heard in the first instance by Bodilly J., who upheld the defendants' objection, and dismissed the suit. On appeal, the High Court reversed his decree, and remitted the cause for trial on the merits with the following remarks :—

"The appeal must be allowed with costs both here and in the Court below, and the case must be remitted to be tried out on the merits if, after the contest which took place in the previous suit, the present respondents think that there are still any merits to be discussed."

The case then came before Chitty J., who, in face of the judgment of the appellate Court on the question of limitation, held that the plaintiffs' suit was "out of time," as Surat Kumari's possession was adverse to their father, Money Madhub, from the 30th June, 1891. He also held that they had failed to prove "the *benami* character of the declaration of trust." He accordingly dismissed the suit.

On appeal the decision of Chitty J. was set aside, and the plaintiffs' claim was decreed with costs. The present appeal before this Board is by Nrityamoni Dassi, who claims to hold the property under the trust deed executed by Surat Kumari on the 18th January, 1892 ; and the plea in bar of the suit is again urged on her behalf.

As their Lordships concur generally with the reasons given by the appellate Court for overruling the plea of limitation, they do not wish to prolong the present judgment by dealing with the question at any length. They desire, however, to observe that if the property belonged in fact to Surat Kumari, and was held by her all along in her own right, as has been the defendants' contention throughout the various stages of this long-drawn litigation in India, obviously no question of limitation arises; neither their father nor the plaintiffs had or have any title to it, and their suit must fail on that ground.

If, however, the "eight houses" never belonged to Surat Kumari, as is now conceded at their Lordships' Bar, if they always remained the property of Guru Charan Sen and devolved on his sons by right of inheritance, then the declarations made by them in the "deed of covenant," which are now admitted to be wholly false, in no way altered the title. It did not purport to transfer any right: it was only an admission of a right which did not exist. There is no allegation, far less any evidence, that Surat Kumari pretended to exercise any right under that document adversely to the real owners until January 1892. It was after the execution of the trust deed of 1892 that Baney Madhub, purporting to act as one of the trustees, began to collect the rents and issues of the eight houses to the exclusion of the other co-sharers. Limitation would no doubt run against them from that time. But it would equally without doubt remain in suspense whilst the plaintiffs were *bona fide* litigating for their rights in a Court of justice. They had in the suit of 1896 before Mr. Justice Henderson associated themselves with the plaintiffs in that action, and had asked for an adjudication in those proceedings of their rights. A distinct issue was framed in respect of their claim, to which no objection seems to have been made by the appellant Nrityamoni; and the learned Judge who decided the case pronounced, with reference to their prayer, the following order:—

"The defendants, the representatives of Money Madhab, will be declared jointly entitled to a one-third share in the scheduled properties, and the Official Referee will make similar enquiries with regard to their share and the share of Nemye Charan Sen, as to mesne profits and the deeds, assurances, and other things which may be necessary. These defendants will be entitled to get possession of the shares to which they have been declared entitled."

It was an effective decree made by a competent Court, and was capable of being enforced until set aside. Admittedly, if the period

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during which the plaintiffs were litigating for their rights is deducted, their present suit is in time. Their Lordships are of opinion that the plea of limitation was rightly overruled by the High Court.

As regards the nature and effect of the deed of covenant of the 30th June, 1891, their Lordships have no hesitation in holding, in concurrence with the High Court, that it was wholly illusory; that it never operated to transfer any rights, nor in fact was it intended to do so; and that it was a mere device for deceiving the creditors of Baney Madhub and Money Madhub, and sheltering the property under their mother's name by making an acknowledgment of a right which never existed. All the facts and circumstances taken in conjunction with the statements in the document itself contradict the suggestion that it was part of a *bona fide* family arrangement.

Their Lordships are of opinion that the decree of the High Court in Suit 826 of 1904 is right, and should be affirmed.

Their Lordships have kept quite separate the question relating to the right to 102, Cotton Street, and 27, Burtollah Street, which is involved in the suit of Madhusudan Sen, brought in the Court of the Subordinate Judge of the 24-Pergunnahs. It arose only incidentally in the litigation of 1896, and in Suit 826 of 1904, mainly in consequence of the endeavour on the part of the defendants to confuse the issues by placing the "eight houses" in the same category as the other houses as property acquired by Surat Kumari Dassi with her own money from Shama Charan Mullick.

Madhu Sudan is a son of Baney Madhub, and he brings this suit for a declaration of his right as one of Baney Madhub's sons to a one-seventh share of 116, Cotton Street, and in the Panihati lands and 111, Cotton Street, and in respect of the *shebuitship* of the Agarpara property. He alleges that the deeds of gift executed by Surat Kumari only gave effect to a family partition under which his father received 116, Cotton Street as his share in the Cotton Street property, and that the transfer to Nrityamoni was wholly nominal.

The Subordinate Judge dismissed his claim with respect to 111, Cotton Street, holding that that property was sold by Baney Madhub *bona fide* for the satisfaction of the debts of the joint family, for which purpose it was, in fact, transferred to him by Surat Kumari, in whose name it stood. He also held, in substance, that the transfer of 102, Cotton Street, and 27, Burtollah Street, by Shama Charan Mullick to Surat Kumari was really for the benefit of Guru Charan Sen, that she had no beneficial interest in the same, and that the allotments made in 1891 by the several deeds of gift as

well as the document of the 18th January, 1892, were executed "with the object of dividing the properties of the three brothers in such a way that their creditors might not seize them in satisfaction of their claims," and that Baney Madhub took 116, Cotton Street in the name of his wife. He accordingly decreed the plaintiffs' claim with reference to that property, the Panihati lands and the *shebaitship*, and his decree has been, with a slight modification, affirmed on appeal by the High Court of Calcutta.

Nrityamoni has appealed, and the sole question for determination now left in this case is whether the two houses were conveyed to Surat Kumari by Shama Charan Mullick in her own right as beneficial owner, or, to use the Indian technical expression, *benami* for Guru Charan Sen and the joint family. Their Lordships have repeatedly laid down that in cases where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came. At this distance of time it is hardly likely that evidence would be forthcoming on either side to establish or rebut conclusively the allegation. The case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. On the plaintiffs' side it is contended that 102, Cotton Street was the family dwelling-house, and that Guru Charan had the strongest possible motive to try to preserve it for the family. The Subordinate Judge finds as a fact, a view which is affirmed by the High Court, that he had means, in spite of his insolvency, to buy it back. From this conclusion on the evidence as it stands their Lordships find it difficult to dissent.

On the defendants' side, it was urged in the written statements that Surat Kumari had bought these two houses, equally with the "eight houses," with her own money. There was absolutely no evidence in support of this allegation; no books of accounts showing payments, and no vouchers or receipts have been produced, nor is there any suggestion that any such ever existed and were now lost. At a later stage of the case, the difficulties which surrounded the defendants' allegation were perceived, and it was then suggested that the conveyance by Shama Charan was a voluntary gift to Surat Kumari, who was a connection of his. If it was a gift, it might, as is contended on behalf of the plaintiffs, as reasonably be a gift to the family in her name.

Guru Charan was an undischarged insolvent; a purchase by him in his own name, or a gift to him in his own name, would have been swept up by the Official Assignee for the benefit of his

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creditors. What more natural then, it is said, than that the conveyance should be in the name of the wife? In this connection it is to be noted that although Shama Charan Mullick acquired the houses in 1859, and the transfer to Surat Kumari was made in 1861, the possession all along appears to have remained as before with Guru Charan, for neither Shama Charan nor Heera Lal ever took possession of the properties.

It is unnecessary to discuss how far these probabilities and inferences, standing by themselves, would outweigh the ostensible title, for the books of accounts that were produced in the litigation of 1896 and are exhibited in the present suits, kept from 1872, coupled with the circumstances referred to above, leave little reason for doubt that the conveyance of 1859 in favour of Surat Kumari was in reality for Guru Charan Sen and his family. They show beyond any reasonable doubt that the rents and issues arising from these two houses were kept in exactly the same way as the rents of the "eight houses"; that they were entered in the books of the three brothers, for Surat Kumari had no books of her own, and were applied towards the expenses of the family. The inference is irresistible that she was not the beneficial owner of any of the houses.

The mortgages in respect of the houses in question executed by her by way of security for the *banianship* of Baney Madhub and Money Madhub respectively, do not militate, in their Lordships' opinion, with this conclusion. As the property stood in her name, the mortgages could only be made by her. It is to be remarked, however, that in almost every instance, Guru Charan Sen was also made a party. Nor do the dispositions she purported to make by her will in 1883 affect the position. Had she died without expressing her wishes as to how the property should be allotted, it would have, in all probability, given rise to a contest. It stood in her name and was open to the contention that it was her *stridhan* to which the two surviving sons were entitled, to the exclusion of the sons of Chuni Lal who had died in her lifetime.

For these reasons their Lordships are of opinion that the judgment of the High Court is right and that both these appeals should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellants will pay the costs of the appeals.

T. L. Wilson & Co. :—Solicitors for the Appellants.

Downer and Johnson :—Solicitors for the Respondents.

J. M. P.

Appeals dismissed.

PRESENT :—*Lord Shaw, Sir John Edge, and Sir Lawrence Jenkins.*

RAJA DEBI BAKHSH SINGH,

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[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER,
OUDH].

Disqualified proprietor—Oudh Law—Revenue Act (Act XVII of 1876), section 174—Court of Wards—Decree on a contract entered into by a disqualified proprietor whilst his property was under the charge of the Court of Wards—Such property even after its release not liable to be taken in execution of such a decree.

Under section 174 of the Oudh Land-revenue Act the property of a disqualified proprietor even after it is released from the custody of the Court of Wards is not liable to be taken in execution of a decree made in respect of a contract entered into by the ward while his property was under the superintendence of the Court.*

Rameshar Bakhsh Singh v. Dhanpal Das (1), overruled.

Appeal from a judgment and decree of the Judicial Commissioner of Oudh, dated 12th November, 1913, which affirmed a finding and order of the Court of the Subordinate Judge of Bahraich, dated the 4th June 1913.

The point for determination was the true construction of section 174 of the Oudh Land-revenue Act.

The appellant was the taluqdar of Mallanpur, the successor to one Raja Muneshwar Bakhsh Singh, whose estate, which included the village Sheopur in question, was under the management of the Court of Wards up to July 1898, when it was released. While the estate was under the said management Raja Muneshwar Bakhsh Singh borrowed certain sums of money from the Respondents. After considerable litigation a decree was obtained from the Judicial Committee: see *Maheshar Parshad v. Muhammad Ewas Ali Khan* (2). In accordance with the directions given by their Lordships it was settled by an order of the Court of the Judicial Commissioner of Oudh that Rs. 12,631-5-9 was due to the respondent. In execution of that decree the village Sheopur, a part of the said estate, was attached.

The appellant entered an objection on the ground that the village

* See sections 60 and 61 of the Bengal Court of Wards Act (IX B. C. of 1879)—Ed.

(1) (1910) 14 Oudh Cases, 6.

(2) (1909) I. L. R. 31 All. 386.

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being property under the superintendence of the Court of Wards at the time of the borrowing, and the borrowing being by a person whose property was under such superintendence at the time of the contract to borrow could not be taken in execution of the decree, relying on section 174, Act XVII of 1876.

The objection of the appellant came before the Court of the Subordinate Judge of Bahraich, who held that the village was liable to attachment, as the estate was only protected while under the said superintendence, and that such superintendence had ceased long before execution proceedings were commenced. His reasons for dismissing the objection were as follows :—

“ Are the Defendant and the property liable for the debt ? I have been referred to 4 Oudh Cases, 28, and 12 Oudh Cases, 300.

“ One of them is a Privy Council decree under execution. In the other case it is not clear whether the property attached was released from the hands of the Court of Wards when attached or not and this being the sole point in the case the ruling does not appear to be applicable. I do not share the view held by the learned pleader for the representative of the judgment-debtor. It does not stand to reason that the property which has been once under the Court of Wards has become, simply on that account, so immaculate that it is untouchable and immaculate for debts contracted during the time it was under the Court of Wards though it has been since released. *The Court of Wards Act was framed for the safe-guarding of the interests of the Court of Wards and better management of the estate and not to make the property non-transferable ever afterwards.* A property attached cannot be transferred after attachment. It is to safe-guard the interests of the person in whose interest the property has been attached. A property mortgaged or sold cannot be transferred to the prejudice of the mortgagee or vendee, but when the mortgage is discharged or the vendee gives up his right in favor of the vendor it becomes the property liable to sale or attachment for the debt of the owner of it. If a man mortgages a property of which he is neither the owner nor in possession, the mortgagee cannot get the property but as soon as, before the limitation to enforce the debt is over, the mortgagor becomes its owner, the mortgagee becomes entitled to enforce his mortgage against the property. In this case as long as the property was under the management of the Court of Wards it could not be attached and sold for debts contracted and in execution of the decree obtained while it was under such management, but as soon as it is released from such managements the

property in that case becomes liable for the debt. I do not think that there is a virtue in a property which has once passed through the hands of the Court of Wards to make such property not liable for ever even after its release from that management for a debt contracted and a decree upon its basis obtained while the property was under such management. I therefore hold that the property is liable to attachment and sale and I dismiss the judgment-debtor's objection with costs."

On appeal the Court of the Judicial Commissioner upheld the decision of the Subordinate Judge for the following reasons:—

"Mr. Sen, who has argued the appeal on behalf of the appellant, has referred us to the ruling in *Ram Parshad v. Musammat Muna Kuar* (1) and to the rulings in *Himanchal Singh v. Jhamman Lal* (2) and *Jhamman Lal v. Himanchal Singh* (3). The last of these rulings was passed on the 17th August 1901. He argues that in a case in which a person's property has been taken under the management of the Court of Wards, a decree obtained in respect of a debt contracted by such a person while his property is under the management of the Court of Wards, cannot be executed against the property of such person after that property has been released in so far as the provisions of Act XVII of 1876 and Act IX of 1873 affect the case. Had these rulings stood alone Mr. Sen's arguments might have prevailed. We find, however, that a Bench of this Court decided on the 24th November, 1910 in *Rameshar Bakhsh Singh v. Dhanpal Das* (4), that property so released is liable to attachment in execution of a decree obtained on a debt contracted while the property was under the management of the Court of Wards. On page 8 occur the words:—"It is quite clear that under the old Act a creditor could obtain a decree upon a bond given by a ward while his property was under superintendence." This is a ruling of a Bench of this Court. It overrules the ruling in 4 Oudh Cases, page 28, which was a ruling of a single Judge of this Court, and we consider it to be binding upon us. As this is a case falling under the old Act, we decide this point against the appellant."

"The judgment-debtor thereupon appealed to His Majesty in Council.

De Gruyther, K. C., and *S. A. Kyffin* for Appellant.

J. M. Parikh for Respondent applied for a postponement, but this was not allowed and the appeal proceeded *ex parte*.

(1) (1901) 4 Oudh Cases, 28.

(2) (1900) I. L. R. 22 All. 364.

(3) (1901) I. L. R. 24 All. 136.

(4) (1910) 14 Oudh Cases 6.

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De Gruyther, K. C. for appellant : The learned Judges of the Court of the Judicial Commissioner have held themselves bound by their own judgment in *Rameshwar Bakhsh Singh v. Dhanpal Das* (1). The protection given against the disqualified proprietor's contracts by section 174 of Act XVII of 1876 would be absolutely nullified if the estate could be rendered liable after its release. Before United Provinces Court of Wards Act (III of 1899) there was nothing to prevent a disqualified proprietor from contracting debts for which his property other than that under superintendence of the Court would be liable ; and the decision appealed against is that even the property under such superintendence would be liable once the superintendence came to an end. The incompetency created by section 173 continues even after the property is released. It is contended that the protection is limited to the time the Court of Wards has the property.

In the North-Western Provinces Land-Revenue Act (XIX of 1873) there is a similar section 205 (B), which was inserted by section 23 of Act VIII of 1879. The only difference is that section 205 (B) comprises both section 173 and section 174 of the Oudh Act, and hence the word 'and' is inserted. The section in the North-Western Provinces Act has been construed in *Himanchal Singh v. Jhamman Lal* (2), where it was held that "the contention that the restriction only remains in force so long as the property is under superintendence and is immediately removed the moment the superintendence ceases is not warranted by law."

To the same effect is the construction of the Oudh Act in *Ram l'arshad v. Musammat Muna Kuar* (3), though the report of that case does not explicitly state that the property had been released. The decision in *Rameshwar Bakhsh Singh v. Dhanpal Das* (1) is not really an authority against as the remarks of the learned Judges were *obiter dicta* so far as the construction of section 174 of the Act was concerned : that point did not arise for decision : the question which did arise was the construction not of the statute, but of a decree : the case was an appeal in execution proceedings where the decree must stand.

The opposite construction involves the insertion of more words in the section, and completely defeats the purpose of the Act. The result would be that, as here, a man would borrow at an enormous rate of interest, and the debt would accumulate till the estate was released, when all the good work done by the Court of Wards would at once be undone.

(1) (1910) 14 Oudh cases 6.

(2) (1900) I. L. R. 22 All. 364.

(3) (1901) 4 Oudh Cases 28.

Their Lordships' judgment was delivered by

Lord Shaw.—By section 162 of the Oudh Land Revenue Act, No. 17 of 1876, certain persons are declared to be disqualified from managing their estates. Among the enumeration of those persons are the following : Under sub-section (g), "Persons declared by the Chief Commissioner on their own application to be disqualified from managing their estates." The Talukdar of Mallanpur was one of those persons. On his application, his estates were assumed by the Court of Wards, and they remained under the management of that Court from the year 1886 until the year 1898.

During that period the Raja borrowed certain sums of money ; and on the 12th August, 1904, his creditors sued and obtained a personal decree against him in the Court of first instance. There were certain judicial proceedings which occurred subsequent to the decree ; and it may be of interest to note that, the debt incurred having been originally a sum of Rs. 4,000, execution is now sought to be obtained against the property put under the management of the Court of Wards for a sum which, at a date somewhat anterior to the present deliverance, amounted to Rs. 21,526, the interest having been running for a certain course of years at the rate of 18 per cent. per annum.

The question in this case, and the sole question, is whether a decree obtained for such sums can be put in execution against the property, which was, at the date of the contraction of the debt, under the management of the Court of Wards.

The sections of the Oudh Land Revenue Act, to which reference has been made, are sections 173 and 174. Section 173 is in these terms : "Persons whose property is under the superintendence of the Court of Wards shall not be competent to create, without the sanction of the Court, any charge upon or interest in such property, or any part thereof." Section 174 says : "No such property shall be liable to be taken in execution of a decree made in respect of any contract entered into by any such person while his property is under such superintendence." Their Lordships think that it falls to be observed that the object of these sections was the protection of the property against either transactions entered into by the person under tutelage by way of direct transactions of sale or of mortgage, and also the protection of the property against the consequences of any execution in respect of contracts entered into by a person under such tutelage. Section 174 deals with the latter situation.

The Courts below have permitted execution against the property to be granted in respect of this debt—a debt incurred by a person

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under tutelage. The question is whether that decision is sound in law. There have been various decisions in the Courts in India, notably in Allahabad, which appear fully to support the appeal. But there is one dictum which is founded upon by the Court below which seems to have ruled the minds of the learned Judges in constraining them to give effect to the execution against the property in respect of this debt. The dictum is contained in the case of *Rameshwar Bakhsh Singh v. Dhanpal Das* (1). It was quite unnecessary, in the view that their Lordships take for the decision of the case, which depended, as it was viewed by the Court who decided it, merely upon the construction of a certain decree. That dictum was to the following effect: "It is quite clear that, under the old Act"—and the reference is either to this Act or an Act in similar terms—"a creditor could obtain a decree upon a bond given by a ward while his property was under superintendence, and execute that decree against the property of the ward after the property was released from superintendence."

Their Lordships are clearly of opinion that this dictum was an unsound proposition in law. They think that, the object of the Act being the protection of the property, a person subject to the Court of Wards would in no sense be protected if this dictum were to be affirmed. What has been done in the present case seems to their Lordships to be a total violation, not only of the spirit of the statute, but of the express provision of section 174. The phrase in that section, "while his property is under such superintendence," is, in their Lordships' opinion, a phrase annexed to and elucidative of the verbal expression "contract entered into by any such person." Section 174 is meant to protect property against the execution of a decree made in respect of "any contract entered into" during a certain period of time, namely, while the property is under such superintendence. If such a contract, incurring of debt, or transaction occurred during that time, the law of Oudh is plain under section 174, to the effect that the property is protected against execution in respect of any decree following upon that transaction, that debt, or that contract.

There is nothing further in the case, and their Lordships will humbly advise His Majesty that this appeal should be allowed with costs.

T. L. Wilson & Co. :—Solicitors for the Appellant.

Edward Dalgado :—Solicitor for the Respondents.

J. M. P.

Appeal allowed.

(1) (1910) 14 Oudh Cases 6.

APPELLATE CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir John Woodroffe, Knight, Judge.

RAI CHARAN MAHANTI AND OTHERS

v.

KANAI KUMAR AND OTHERS.*

Lease—Transfer of Property Act (IV of 1882), Sec. 3—Trees reserved by the lessor—Lessor, if can cultivate shellac on the trees—Fruits and flowers—Kabuliat, construction of.

In construing a *Kabuliat* it is permissible to look at the circumstances under which it was executed.

A lessor reserved property in the trees growing on the lease-hold land and the lessee was prohibited from taking them away; the latter was given enjoyment of the *phal phul* (fruits and flowers) of the trees only at the lessor's permission :

Held, that this ownership did not carry with it a right to go on the lessee's land to cultivate shellac on the trees reserved.†

A transfer of property passes to the transferee the interest of the transferor unless a different intention is expressed or necessarily implied.

Per Sanderson, C. J. : Fruits and flowers of the trees would in the ordinary meaning of the words include the natural products of the trees.

Appeal by the Plaintiffs.

Suit for an injunction restraining the defendants from interfering with their alleged right to cultivate shellac on trees standing on ground leased to the defendants but the ownership of which trees were declared by the lease to be in the lessor subject to the right of the lessees to *phal* and *phul* in respect thereof. The injunction was asked for on the grounds that the plaintiffs cultivated lac on certain of the trees which was appropriated by the defendants, and that the defendants threatened to oppose the plaintiffs' alleged right in respect of other trees of the mouza. The lower appellate Court held that the plaintiffs were entitled to nothing more than a bare declaration of right in the trees and were not entitled to *khas* possession or to a perpetual injunction against the defendants.

* Appeal from Appellate Decree No. 1226 of 1914, against the decree of C. Tindall Esq., District Judge of Bankura, dated the 10th February, 1914, modifying that of Babu Probodh Chandra Bosu, Munsiff of Khatra, dated the 20th January, 1913.

[† See in this connection *Rameshwar Malia v. Ram Nath* (1905) 3 C. L. J. 103; I. L. R. 33 Calc. 462, where the implied reservation of incidental rights in a mining lease, in which the lessor reserved the rights of mining, was considered. —Rep].

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Babus Bepin Behary Ghosh and Bankim Chandra Mukherji
for the Appellants.

Babu Samatul Chandra Dutt (for *Babu Soroshi Charan Mitter*)
for the Respondents.

C. A. V.

The judgments of the Court were as follows :

Sanderson, C. J.—The facts of this case are that the plaintiffs purchased at an auction sale, held under a decree which had been obtained against the defendants, the mukurari tenant right of the village of Jhilimili.

The defendants 1 to 3 and another are tenants of the plaintiffs under a lease granted by the plaintiffs, dated 14th April, 1892 in respect of the lands in the village except 30 bighas of lands which the plaintiffs "kept in khas" and the trees hereinafter referred to. The defendants Nos. 4 to 6 are sub-tenants of defendants 1 to 3. In this action the plaintiffs ask for a declaration that the right of the plaintiffs as stated in the plaint may be declared in the trees in the land described in schedule (Ka) in the plaint which as I understand include all the trees on the land demised by the plaintiffs and for a permanent injunction restraining the defendants from opposing the plaintiffs in any way in their possession of the aforesaid trees and for a decree awarding Rs. 156 the value of lac grown on 13 trees.

As regards the last mentioned claim which was in the nature of damages it was admitted by the learned vakil for the appellants that the matter was not open to him as the lower appellate Court had found against the plaintiffs on a question of fact.

The claim for the declaration and injunction therefore remained.

The plaintiffs wish to cultivate lac on the trees in question and allege that the defendants are threatening to oppose them in their possession of the trees in the mouzah. The lower appellate Court has held that they are entitled to nothing more than a bare declaration of right in the trees and they are not entitled to khas possession or to a perpetual injunction against the defendants.

The question primarily depends upon the terms of the lease.

The lease after providing that the plaintiffs have settled all the remaining lands on the lessees at an annual rent of Rs. 125, and that the lessees should enjoy the aforesaid land in jote by tilling and cultivating it themselves and through their tenants proceeded as follows :—

"Be it expressed here that all trees large and small that stand on

the aforesaid land and that may grow in future belong to you (i. e., the plaintiffs for the purpose of this case) in khas. We (i. e., for the purpose of this case the defendants 1 to 3) shall be able to enjoy the fruits and flowers of the said trees only at your permission but on no account we shall be able to take the trees." The original of this part of the kabuliat, and what I understood is a correct literal translation are to be found at page 10 of the paper book in the judgment of the learned Munsiff.

The effect of this clause, in my judgment, is to exclude the trees from the lease and that such trees remained in the khas possession of the plaintiffs; the lessees however being granted a license to enjoy the fruits and flowers of the said trees at the permission of the plaintiffs. The first question which arises is whether such license to enjoy the fruits and flowers of the said trees would include the right to carry on the artificial cultivation of lac on the trees and enjoy the results thereof.

Prima facie in my judgment this would clearly not be included in the license. 'Fruits and flowers' of the trees would in the ordinary meaning of the words include the natural products of the trees only; but it is urged that the circumstances existing at the date of the lease must be looked at for the purpose of construing the words.

The lower appellate Court has found "from the evidence that the Sunthals had been growing lac from before the date of the kabuliat on those trees" and that the words *phal phul* in the absence of express reservation embraced the taking of the produce of the trees generally and so included the growing of lac on the trees.

This Court is not in a position to review this finding of fact as long as there was evidence on which the lower appellate Court could act, and I am not aware that it has been suggested that there was not such evidence. In view of this finding of fact, it must be taken that the parties to the lease were aware of the existence of the cultivation of lac upon the trees by the defendants their tenants at the date of the lease, and consequently I think it is possible that the words "*phal-phul*" may have been intended to have a wider application than the English words "*flowers and fruits*," and accordingly I am not prepared to dissent from the decision of the lower appellate Court. I express no opinion as to whether the license above referred to is a revocable or irrevocable license, as the point has not been raised or argued before us.

In view of this conclusion it is not necessary to deal with the other points raised by the defendants; and I think the appeal should be dismissed with costs.

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Woodroffe, J.—The suit of the plaintiff is when substantially regarded a suit for an injunction restraining the defendants from interfering with his alleged right to cultivate shellac on trees standing on ground leased to the defendants but the ownership of which trees were declared by the lease to be in the lessor subject to the right of the lessees to *phal* and *phul* in respect thereof. The grounds of the injunction are that the plaintiffs cultivated lac on certain of the trees which was appropriated by the defendants. This has been found not to be the fact. But it is also alleged that the defendants threaten to oppose the plaintiff's alleged right in respect of other trees of the mouza. Formally, therefore, a case for an injunction is made out if the right claimed is established. This is denied on various grounds. The matter has previously been before four Courts three of which have decided favourably to the defendants, and the District Judge has found that the appellant before us, the plaintiff having been punished for his attempt to break the lac grown by the Santhal defendants has shifted his ground and set up a false story of having himself grown lac on other trees of the appellants' tenancy. He finds and I think these facts are relevant to the matter before us that the landlord did not grow lac as he claims to do, and that the defendants have grown lac for over 12 years and had been growing lac before the date of the kabuliat to the plaintiff. In construing the kabuliat it is permissible to look at the circumstances under which it was executed. It has been found that the Santhals have been living throughout on cultivation and the produce of the forest of which the plaintiff must be taken to have been aware. The good land was kept khas by the plaintiff and the defendants were set to reclaim the rest including the jungle land. According to the plaintiff they may not remove trees large or small and therefore the scope of the reclamation of the forest land is to that extent limited. At the same time he says they are not to live on the produce of the forest except the flowers and fruits of the trees, in the strict sense, which are of little value. They are not entitled it is alleged in particular to cultivate shellac or to take wild shellac and must permit him to do both. The Judge finds that the plaintiffs who are rich men were mere rent receivers and the cultivating interest was made over to the defendants subject to the terms of the lease. I would determine this question upon a construction of the lease only. I am not prepared to disagree from the view that *phal* and *phul* would include produce of the trees other than the particular flowers and fruit of the trees itself. This is the view of the District Judge and of the first Munsiff who tried the case. The second Munsiff was of opinion that *phal phul*

did not include cultivation of shellac, but he left open the nature of the license to take *phal phul*: for instance whether that included the right to take fire wood, thus showing that in his opinion also it is possible that the word *phal* has a wider meaning than that sought to be attached to it by the appellant. If this view taken by the Judge be the correct interpretation of these words then shellac would be *phal*. But it is not necessary to base the case on this, for in the view I take a transfer of property passes to the transferee the interest of the transferor unless a different intention is expressed or necessarily, implied. Now what was it that the lessor reserved? There is no doubt that the property in the trees was reserved, and the lessees were prohibited from taking them away. The exact terms of the lease are "all trees large and small belong to you in khas," "we shall not be able to take them away." "We shall be able to enjoy the *phal phul* of the trees only at your permission." There is nothing unusual in this reservation of the trees. The lease means what it says, namely, that the trees themselves remain the property of the lessor notwithstanding the lease and therefore cannot be taken away. It does not say, and in my opinion does not mean that the landlord was entitled to come on the land to pursue a regular course of cultivation of shellac on the property he had leased to the defendants. If this had been originally intended it would probably have been inserted in the lease, for, according to the evidence, from before that date lac had been cultivated by the Santhals: nor should we expect to find as the District Judge finds that there has been no user of the alleged right by the plaintiff landlord and a user by the tenants for over 12 years. It is not improbable therefore that the claim now set up is an after-thought when it was discovered that the tenants were making some profit from the shellac in the jungle. On the ground therefore that the lease did not reserve to the landlord the right of cultivation claimed, and that the reservation of the trees is not a reservation of such right to cultivation, I hold that the Judge is right in determining that the plaintiffs have not established the right claimed in the tree reserved. This ownership does not carry with it a right to go on the tenants' land to cultivate shellac on the trees reserved. It follows that the plaintiffs are not entitled to the injunction claimed. It is not necessary to determine the other points raised, in particular that of limitation or adverse possession or that which is said to arise under section 178 and other sections of the Bengal Tenancy Act. I would therefore affirm the decree of the District Judge and dismiss this appeal with costs.

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Woodroffe, J.

Before Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

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NAWAB SALIMULLA BAHADUR AND OTHERS

v.

PROBHAT CHANDRA SEN AND OTHERS.*

Partition—Trust deed executed by administrator with the permission of the District Judge—Trust deed empowering trustee to grant permanent leases—Person interested not impeaching the lease.

A trust deed was executed with the sanction of the District Judge, by an administrator of the estate of a deceased co-owner in favour of a mortgagee, with power to trustees to grant permanent leases. In pursuance of that deed a permanent lease was executed in favour of the plaintiff. The latter remained in possession with other co-owners for about 7 years, when he brought a suit for partition. In that suit he impleaded a person who was interested in opposing the lease. He did not contest the lease.

Held, that the plaintiff had sufficient interest to maintain such a suit for partition.

Sundar v. Parbati (1) and Bhagwat v. Bepin (2) followed.

Appeals by the Plaintiffs.

Suits for partition.

The material facts and arguments appear from the judgment.

Mr. B. Chakravarty and *Babu Surendra Nath Guha* for the Appellants.

Babus Joges Chunder Roy, Jatindra Nath Bose and Kshitis Chandra Neogy for the Respondents.

The judgment of the Court was as follows :—

These appeals arise out of suits for partition, and the Courts below have dismissed the suits upon a preliminary point, namely, that the plaintiffs had not acquired any such interest in the properties as to entitle them to maintain a suit for partition.

It appears that one Madhu Sudan Das left four sons, Mohini Mohan Das, Radhica Mohan Das, Lal Mohan Das and Khettra Mohan Das. Khettra Mohan's interest devolved upon Mohini Mohan, Radhica Mohan's interest devolved upon his widow Gobinda Rani and Lal Mohan's interest was, inherited by his widow Priya Moyee. Mohini Mohan Das obtained a loan of Rs. 2,50,000 from

* Appeals from Appellate Decrees Nos. 1495, 1656 and 1657 of 1913, against the decrees of F. W. Ward Esq., District Judge of Tipperah, dated the 6th February 1913, affirming those of Babu Satkori Halder, Subordinate Judge, 1st Court of Tipperah, dated the 26th February 1912.

(1) (1889) L. R. 16 I. A. 186 ; I. L. R. 12 All 51.

(2) (1910) L. R. 37 I. A. 198 ; I. L. R. 37 Calc. 918.

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the Eastern mortgage and Agency Company under a deed of mortgage, dated the 27th September, 1890. One of the conditions upon which and subject to which the said Company agreed to grant the said loan was that the mortgaged properties should be managed entirely and without any interference from the said mortgagor by Mr. Garth and Mr. Weatherall and Mohini Mohun executed a power of attorney in their favour. Mohini Mohan died on the 28th December 1896, and Letters of administration of his estate were granted to one Soshi Bhusan Guha on the 29th January, 1897. The mortgagees, it appears, subsequently found that there were difficulties in the way of management of the estate and in the conduct of law suits which could be avoided if the properties were vested in Trustees. An indenture transferring the mortgaged properties to Messrs. Garth and Weatherall as Trustees with powers to manage them which included the power to grant perpetual leases was accordingly drawn up and submitted by the administrator to the District Judge of Dacca who sanctioned it on the 1st May, 1897. On the 3rd April 1897, the Indenture was executed between the administrator Sashi Bhusan Guha representing the estate of the mortgagor Mohini Mohan Das, the Eastern mortgage and Agency Company the mortgagees and Messrs. Garth and Weatherall the Trustees, transferring the properties to the latter as Am-mukteers, Managers and Trustees. Priya Moyee executed an usufructuary mortgage in respect of her share in favour of the said Messrs. Garth and Weatherall for a term of years and also a trust deed with similar powers. These trustees granted certain permanent leases, Dur Sikmi tenures, in two of the cases, and a Putni Taluk in the third, in favour of the plaintiffs in 1903 in respect of certain shares in some properties and the plaintiffs remained in joint possession of those shares with the other co-owners since 1903; and in September 1910 the plaintiffs brought these suits for partition against those other co-sharers.

It may be mentioned here that on the death of Mohini Mohan and Priya Moyee, their estate devolved upon Shampyari.

The Court of appeal below held that section 90 of the Probate and Administration Act does not empower an administrator appointed under the act to delegate his powers to others; that even if the Trust deed was valid, Sashi Bhusan being dead his administration ceased many years ago, and the "Sub-Trustees" could not grant leases after their own Trusteeship ceased; and that in any case they had no right to grant permanent leases it being nowhere provided that their possession was to be permanent. As regards Priya Moyee the Court below observes that it was not the case of the

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plaintiffs that she executed the leases for legal necessity, and she having died, any permanent leases granted in respect of her share by the said trustees are voidable.

That Court accordingly held that the leases set up by the plaintiffs were voidable and that "it is clearly then undesirable that a partition should be effected until it is definite that such leases are not so voidable."

It is unnecessary to consider in the present cases whether the leases obtained by the plaintiffs from Messrs. Garth and Weatherall are valid or voidable at the instance of the reversioner after the death of Shampyari. The plaintiffs are in joint possession of the shares with the defendants as co-sharers, under leases which purport to be permanent leases, granted to them under an arrangement sanctioned by the Court. The only person at present interested in challenging their right is Shampyari who is a party to the suit and she does not contest the suit. The contending defendants have no interest whatever either present or future in the shares in respect of which the plaintiffs claim to be lessees, and the plaintiffs have been in possession jointly with them ever since 1903 without any objection on the part of the defendants. In fact in some rent-suits these defendants made the present plaintiffs parties defendants as co-sharer landlords. We think that under the circumstances the principle laid down in the case of *Mussammât Sundar v. Mussammât Parbati* (1) applies. In that case two Hindu widows were in lawful possession of properties of their deceased husband and one of them brought a suit for partition against the other. There was a question in that case whether there had been a valid adoption made by the deceased husband and whether the estate had been given to the said adopted son by a will of the deceased. The Judicial Committee held that apart from those questions, the fact of joint possession by the two widows of the estate which belonged to the testator ever since the death of the adopted son appeared to them sufficient for disposing of the suit in favour of the plaintiff. Referring to the possession of the widows, their Lordships observe—"Their possession was lawfully attained, in this sense, that it was not procured by force or fraud; but peaceably, no one interested opposing. In these circumstances it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of Praisukh (the adopted son) or of Baldeo Sahai (the deceased husband) one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of these possible claimants is

in the field, and the widows have therefore, each of them, an estate or interest in respect of her possession, which cannot be impaired by the circumstance that they may have ascribed their possession to one or more other titles which do not belong to them."

The same consideration applies to this case.

It is contended on behalf of the respondents that the court ought to take into consideration the fact that on the death of Sham Priya, the reversioner may bring a suit for setting aside these alienations, if he succeeds in doing so, the partition would have to be set aside. That we think is not a sufficient ground for refusing the plaintiffs the right to partition which they have at present in respect of their possession. In the case of *Lala Bhagwat Sahai v. Bepin Behari Mitter* (1), it was held by this court that the Mokararidars (the plaintiffs in that case for partition) had not such a permanent interest as to ensure that any partition then effected would be of enduring effect, on the ground that the Mokararidars in that case might incur forfeiture in certain contingencies mentioned in the lease. Their lordships in overruling the decision observed as follows :—

"But those learned Judges held that the right of partition, which would otherwise have belonged to the appellants, the mokararidars, was lost by reason of the fact that their mokarari is liable to forfeiture in certain contingencies, and therefore is lacking in the permanence of interest necessary to support a claim for partition. Their lordships are of opinion that the distinction thus introduced cannot be supported."

"The title of the appellants is a permanent title, though liable to forfeiture in events which have not occurred and the rights incidental to that title must, in their lordships' opinion, be those which attach to it as it exists, without reference to what might be lost in future under changed circumstances."

Having regard to the circumstances already stated, and to the fact that the only person who is now interested in challenging the title of the plaintiffs has not contested the suit at all we think the courts below are wrong in dismissing the suit upon the preliminary ground mentioned above.

The decrees of the courts below are accordingly set aside and the cases sent back to the court of first instance in order that they may be tried on the merits.

Costs of these appeals will abide the result.

A. T. M.

Appeal allowed.

(1) (1910) L. R. 37 I. A. 198.

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Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.

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May 28, 31.

PARAMANANDA SINGH

v.

SYJOU SINGH.*

Ejectment—Lease for a term—Option of renewal—Option not exercised—Holding over—Notice to quit, effect of—Landlord and Tenant Procedure Act (VIII B. C. of 1869), Sec. 53.

On the determination of a lease for a term, the lessee is bound to surrender possession to the lessor ; on default, he may be ejected without notice, for though he entered into the land with right, he has remained without right, as the tenant cannot be said to hold over, unless the landlord assents to the continuance of his possession.

Durgi Nikarini v. Goberdhan (1) followed. *Huronath v. Smith* (2) distinguished.

The assent of the landlord to the continuance of the occupation of the tenant after expiry of the term may be indicated by acceptance of rent or by conduct which justifies an inference to that effect.

The fact that the landlord tolerates the continuance in occupation of the tenant after the expiry of the term, does not make his former tenant, his tenant in future.

Ratan Lal v. Farshi Bibi (3) and *Doe v. Inglis* (4) referred to.

The serving of notice to quit, on the person who continues in occupation after the expiry of the term, does not make him a tenant whose tenancy is to be terminated by a notice to quit.

Doe v. Inglis (4) referred to.

The defendant took a lease of the disputed land in the district of Sylhet from the plaintiff for a term of 3 years from 13th April 1904 till 12th April 1907. The lease provided expressly that the tenant would give up possession upon the expiry of the term and that, if he desired to continue as tenant, he would take a fresh lease. The term expired, but the defendant neither took a fresh lease nor made over possession of the land to the plaintiff. Notices were served on the 8th and 15th October 1910, asking the defendant to quit on the 13th April, 1911 :

Held, that the defendant ceased to be tenant upon the expiry of his term and was liable to be ejected in the manner prescribed by section 53 of the Landlord and Tenant Procedure Act.

Appeal by the Defendant.

Suit for ejectment.

The material facts and arguments appear from the judgment.

* Appeal from Appellate Decree No. 1241 of 1914, against the decision of Babu Kailas Chandra Sen, Subordinate Judge of Sylhet, dated the 10th March, 1914, reversing that of Moulvi Paziruddin Ahmed, Munsiff of Karimgunj, dated the 24th February, 1913.

(1) (1914) 20 C. L. J. 448.

(3) (1907) I. L. R. 34 Calc. 396.

(2) (1865) 2 W. R. 73.

(4) (1810) 3 Taunt. 54.

Babu Bhupendra Chandra Guha for the Appellant.

Babu Birendra Chandra Das for the Respondent.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the defendant in an action in ejectment. On the 18th April 1904, the defendant took a lease of the disputed land from the plaintiff for a term of three years, from the 13th April 1904 to the 12th April 1907. The lease provided explicitly that the tenant would give up possession upon the expiry of the term and that, if he desired to continue as tenant, he would take a fresh lease. The term expired, but the defendant neither took a fresh lease nor made over possession of the land to the plaintiff. The consequence was that on the 8th and 15th October 1910, the plaintiff gave notices to the defendant and asked him to quit the land on the 13th April, 1911. This demand was infructuous, and on the 29th June, 1911 the plaintiff commenced this action to eject the defendant. The Subordinate Judge has held that the tenancy terminated upon the expiry of the prescribed term of three years and that thereafter, as the landlord did not assent to the continuance of the occupation by the defendant, the latter became a trespasser liable to be ejected without service of notice to quit. On the present appeal, this view has been assailed as erroneous in law.

The disputed land lies in the district of Sylhet, where Act VIII of 1869, B. C. is still in operation. Section 53 lays down that, whenever in any suit, brought by any zemindar or other person in receipt of the rent of the land, to eject any cultivator not having a right of occupancy or to eject any farmer or other tenant holding only for a limited period, after the determination of the lease or tenancy, the Court shall pass a decree in favour of the plaintiff, no application in the form provided in section 212 of Act VIII of 1859 shall be necessary, but the Court shall forthwith, upon the plaintiff depositing in Court the necessary expenses, make an order for delivery of possession in execution of the decree. In the present case, the Subordinate Judge has found that the defendant is not a cultivator with a right of occupancy. Consequently, on the determination of his lease, he was liable to be ejected forthwith in execution of a decree in the manner prescribed in Sec. 53. But it has been argued that as he has remained in possession after the expiry of the term of his lease, he has acquired an undefined interest in the land and is entitled to continue in occupation till that interest has been determined by notice to quit. This argument is entirely fallacious.

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On the determination of a lease for a term, the lessee is bound to surrender possession to the lessor; on default he may be ejected without notice, for though he entered into the land with right, he has remained without right, as the tenant cannot be said to hold over unless the landlord assents to the continuance of his possession. *Durgi Nikarini v. Goberdhan* (1). But the appellant has contended that the mere continuance of his possession gives him the status of a tenant, and, in support of this view, has invited our attention to the decision in *Huronath v. Smith* (2). That case is clearly distinguishable. There, under the terms of the lease, the tenant was entitled to retain possession of a part of the premises, even after the expiry of the term, and was bound to execute a fresh settlement in respect of such portion. The question arose, whether the mere fact that such fresh lease had not been executed, affected the position of the tenant; the answer was adverse to the landlord, for it was found that the tenant had expressed his readiness to accept the lease from the landlord, who had refused to execute the document. There is, on the other hand, a long line of authorities in this Court which negative the contention of the appellant. Reference may be made to the judgment of Sir Barnes Peacock C. J. in *Ram Khelawun Singh v. Mussamut Soondra* (3) where the Chief Justice observed that, according to English law and according to general principles of justice, if, after the expiration of a lease, a landowner continues to receive rent for a fresh period, he must be deemed to have acquiesced in the tenants' continuing to hold upon the terms of the original lease and cannot turn out the tenant or treat him as a trespasser without giving him reasonable notice to quit. In the earlier decision in *G. P. Mackintosh v. Gopee Mohan Mojomdar* (4), the proposition was formulated that to justify a holding over after expiry of a lease, a direct consent on the part of the landlord is requisite; and that no implication of consent can or should be received, where there has been every opportunity of consent in express terms. Later decisions, specially those of *Sadhoo Jha v. Bhupwan Oopadhya* (5), *Sofaoll Khan v. Woopean Khan* (6); *Jumant Ali Shah v. Chutturdharee Sakee* (7) and *Ganapathi v. Venkata Lakshminarasaya* (8) indicate that this rule was too broadly expressed and that the assent of the landlord to the continuance of the occupation of the tenant after expiry of

(1) (1914) 20 C. L. J. 448.

(2) (1865) 2 W. R. 73.

(3) (1867) 7 W. R. 152.

(4) (1865) 4 W. R. 24.

(5) (1866) 5 W. R. Act X Rulings 17.

(6) (1868) 9 W. R. 123.

(7) (1871) 16 W. R. 185.

(8) (1914) 1 Mad. W. N. 728.

the term may be indicated by acceptance of rent or by conduct which justifies an inference to that effect. But there is no authority, except possibly a dictum of Patteson J. in *Doe d. Thomas v. Field* (1) mentioned in *Fahy v. O' Donnell* (2), which supports the proposition that merely because the landlord tolerates the continuance in occupation of the tenant after the expiry of the term, the inference follows as a matter of course that he accepts his former tenant as his tenant in future. This proposition is, on the other hand, opposed to the decision in *Ratan Lal Gir v. Farshi Bibi* (3). It is also opposed to the decision of Mansfield C. J. in *Doe v. Inglis* (4), where the contention was that as the tenant had continued in occupation after the expiry of the term, he was entitled to notice to quit, though there was nothing to indicate that his continuance had been accepted by the landlord. Mansfield C. J. observed : "You do not show that the holding subsequent to the expiration was with the assent of the lessor." Reliance was there, as here, placed upon the fact, that the landlord had served a notice to quit ; and it was argued that this circumstance afforded an unfailing indication that the defendant was still a tenant, whose tenancy was required to be terminated by a notice to quit. This contention was overruled in the following terms : "This writing is not in the least like a notice to quit ; but it is a mere demand of possession, the defendant's term having sometime since expired. The lessor of the plaintiff need not have given any notice at all ; but the circumstance of his having given a notice, will not hurt him." In our opinion, it is incontrovertible that the defendant in this case ceased to be tenant upon the expiry of his term and is liable to be ejected in the manner prescribed in Sec. 53 of Act VIII of 1869 B. C. The position might have been different if the provisions of the Bengal Tenancy Act had governed this case ; but we need not deal with this aspect of the matter, because that statute admittedly has no application.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1831) 2 Dowling P. C. 542.

(2) (1870) I. R. 4 C. L. 332 (335).

(3) (1907) I. L. R. 34 Calc. 396.

(4) (1810) 3 Taunton 54.

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Mookerjee, J.

Before Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

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January, 4
March, 7.

MATHURA MOHAN SAHA AND OTHERS

v.

NABIN CHANDRA DATTA AND OTHERS.*

Sale, effect of—Sale of a tenure for its own arrears of rent—Purchase of a patni taluk—Application to set aside sale—Pending proceeding, second suit for rent—Payment by purchaser to save the taluk from sale—Suit for recovery of amount paid.

In the absence of anything to denote the contrary, a sale of a tenure held in execution of a decree for its own arrears of rent passes it free from liability for previous arrears.

Moharance v. Harendra (1); *Peary Mohan v. Sreeram* (2); and *Manindra v. Jamahir* (3) distinguished. *Fazl Rahaman v. Ramsukh* (4); and *Haradhan v. Kartik* (5) referred to.

Appeal by the Plaintiffs.

Suit for recovery of money.

The material facts and arguments are stated in the judgment.

Dr. Sarat Chunder Basak, Babus Bepin Chunder Bose and Sridhar Das Gupta for the Appellants.

Babus Sib Chandra Palit, Kumar Sanker Roy and Upendra Kumar Roy for the Respondents.

C. A. V.

The judgment of the Court was as follows :

March, 7.

This appeal arises out of a suit for the recovery of Rs. 6249-2-0 which was paid by the plaintiffs in order to save a patni taluk from being sold in execution of a decree for arrears of rent, under the following circumstances :

The plaintiffs on the 5th June, 1906 purchased the patni taluk for Rs. 11,000 at a sale held in execution of a decree for arrears of rent due thereon upto Assar kist of 1312 B. S. Some of the patnidars applied to set aside the sale on the 26th June, 1906. The application was dismissed for default on the 23rd March, 1907, when the sale was confirmed, but the application was subsequently revived and eventually dismissed on the 27th January, 1908. While the proceedings for setting aside the sale were pending, and on the

* Appeal from Original Decree No. 59 of 1911, against the decree of Babu Satkari Halder, Officiating Subordinate Judge, 1st Court Tipperah, dated the 28th November, 1910.

(1) (1866) 1 C. W. N. 458.

(2) (1902) 6 C. W. N. 794.

(3) (1905) I. L. R. 32 Calc. 643.

(4) (1893) I. L. R. 21 Calc. 169.

(5) (1902) 6 C. W. N. 877.

19th March, 1907, the Zemindar brought a suit for arrears of rent of the last 3 kists of 1312 and the whole of the year 1313 B. S., against the recorded patnidars (defendants 1 and 2 in that suit), and the plaintiffs who had purchased the patni also were made parties to the suit as defendants 3 to 10.

The present plaintiffs (defendants Nos. 3 to 10 in that suit) contended that they had not obtained possession of the auction-purchased property and the Zemindar was not entitled to any relief against them, nor to lay any claim over the sale proceeds.

On the 6th July, 1907, the Court made a decree which after directing that the defendants do pay to the plaintiffs the amount of rents, cesses, damages and costs decreed proceeded as follows :—
“That the decretal amount be at first realised by the sale at auction of the property in arrears ; but if the entire amount be not realised by the sale at auction of that property, plaintiffs shall be able to realise the amount claimed from the surplus sale proceeds of that taluk as realised on the 6th June, 1905, by Mathura Mohun Saha and others (the present plaintiffs) and from the defendants Nos 1 and 2 personally ; and it is further ordered that on the confirmation of the sale the defendants Nos. 3 to 10 shall remain liable for the amount of deficit, in proportion to their liability from the date of the sale or from the date of confirmation of the sale. But they shall not be liable in any other way. But even if the sale be not confirmed, the defendants Nos. 1 and 2 shall remain personally liable.”

In execution of that decree the patni was put up for sale, and the plaintiffs whose purchase at the previous sale had been by that time finally confirmed deposited the decretal amount (Rs. 6066-1-6) and saved the patni from sale. It appears that out of the 11,000 rupees the proceeds of the sale at which the plaintiffs had purchased, Rs. 7438 is still left in deposit as the surplus sale proceeds, and the plaintiffs in the present suit which was brought against the former patnidars (both recorded and unrecorded) seek to recover the amount paid by them together with interest and costs (Rs. 6249-2-0) from the defendants and from the surplus sale proceeds.

The Court below held that the plaintiffs are not entitled to recover the sum paid by them, and they have appealed to this Court.

The first question for consideration is whether the plaintiffs were liable for the arrears of rent which were paid up by them. Now the said arrears were for a period prior to the date of the confirmation of the sale at which the plaintiffs purchased the patni, during which the former patnidars were in possession. The Court below was of

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opinion that as rent is a first charge on the patni the plaintiffs purchased it charged with the rent due in respect of it at the time of their purchase, and relying on the cases of *Srimati Moharanee Dasya v. Harendra Lal Roy* (1), *Peary Mohan Mukhopadhyaya v. Sreeram Chandra* (2) and *Manindra Chandra Nandy v. Jamahir Kumari* (3), held that it was the plaintiffs who were bound to satisfy the rent decree.

We are of opinion however that the principle laid down in those cases do not apply to the present case. The purchaser in those cases purchased the tenure at a sale held in execution of a decree, other than a decree for rent, and such a purchaser in the absence of anything to denote the contrary must be taken to have purchased it charged with the rent which might be due in respect of it at the time of his purchase. In the present case, the tenure was sold in execution of a decree for arrears of rent, and where a tenure or holding is sold in execution of a decree for its own arrears of rent it passes to the purchaser freed from all liabilities for its previous arrears. See *Faez Rahaman v. Ramsukh Bajpai* (4), see also the case of *Haradhan Chatteraj v. Kartik Chandra Chattopadhyaya* (5) in which the purchaser of the tenure purchased it with a notice that it was saddled with liability for previous arrears, and the case of *Faez Rahaman*, was distinguished on that ground.

We are of opinion that in the absence of anything to denote the contrary, a sale of a tenure held in execution of a decree for its own arrears of rent passes it free from liability for previous arrears. That being so the plaintiffs were not in fact liable for the arrears of rent for the period prior to the date of confirmation of sale at which they purchased the patni.

The next question for consideration is, what is the effect of the decree in the second rent suit to which the plaintiffs were parties. At the date of that decree, the sale held in execution of the previous decree (at which the plaintiffs purchased) had not been confirmed, and proceedings for setting aside that sale were then pending.

The decree is not a well-drawn instrument. It begins apparently by imposing a joint and several liability on the two sets of defendants (the plaintiffs and the defendants in the present suit). No doubt it goes on to say that the tenure shall be sold in the first instance, but it also appears to recognise a primary personal liability on the part of the defendants in the present suit. It also leaves open

(1) (1896) 1 C. W. N. 458.

(2) (1902) 6. C. W. N. 794.

(3) (1905) I. L. R. 32 Calc. 643.

(4) (1893) I. L. R. 21 Calc. 169.

(5) (1902) 6 C. W. N. 877.

the question whether on the sale of the tenure being confirmed any personal liability on the part of the plaintiff is to arise as from the 5th June, 1906, the date of the sale (in which case the plaintiffs would be liable for a considerable portion of the arrears covered by that suit, July 1905 to March 1907), or as from the 23rd March, 1907, the date of the confirmation of the sale.

The case is not free from difficulty, but in our opinion regard being had to the circumstances and especially to the circumstance that the sale was not finally confirmed when the decree was made, the decree does not preclude the plaintiffs from succeeding in the present suit on the ground that it placed the burden of the debt due to the landlords once for all on the land. That was the ground on which the learned Subordinate Judge dismissed the suit, and no doubt there is something to be said for the conclusion at which he arrived. On the whole however, as it appears to us, the present suit may be regarded either as a suit for contribution on the footing that the decree in the rent suit treated the plaintiffs and the defendants as jointly and severally liable for the arrears claimed or as a suit for the determination of an issue as to the respective liabilities of the plaintiffs and the defendants, an issue which was not finally decided between them in the rent suit and which may therefore be legitimately raised in such a suit as the present.

In either of these two views of the nature of the present suit, the plaintiffs are entitled to succeed.

The defendants Nos. 39 and 40 in execution of their mortgage decree against the defendant No. 13 (one of the former patnidars) attached his interest in the surplus sale proceeds to the extent of Rs. 472. The plaintiffs in this Court do not object to the payment of Rs. 472 to the said defendants Nos. 39 and 40 out of the surplus sale proceeds in the first instance.

The plaintiffs will accordingly get a decree for Rs. 6249-2-0 the amount paid by them, to be realised from the surplus sale proceeds of the sale held on the 5th June, 1906.

Under the circumstances, each party will bear its own costs in both Courts.

A. T. M.

Appeal allowed.

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Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.

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May, 13.

BISESWAR GANGOOLY AND ANOTHER

v.

BHAGABATI CHARAN BANERJEE AND ANOTHER.*

Possession—Co-owner—Co-owner's possession when adverse.

Possession is never considered adverse if it can be referred to a lawful title.

Thomas v. Thomas (1) referred to.

The possession of one of the owners of a property is in law the possession of his co-owner, and nothing short of ouster or something equivalent to ouster can put an end to that possession.

Corea v. Appuhamy (2) referred to.

Where, however, the possession of both the co-owners of a property was terminated by a hostile third party, who claimed to hold the property adversely to both of them, and one of the co-owners subsequently came into possession of the property under a lease granted by the adverse possessor and continued to do so for more than 12 years :

Held, that the title of the other co-owner to the property was extinguished inasmuch as the possession of the property must be referred to the title which the co-owner acquired under the lease and not to his title as a co-owner of the property.

Lokenath v. Dhakeswar (3) relied on.

Appeal by the plaintiffs.

Suit for declaration of title to land and for recovery of joint possession thereof along with the defendants.

The material facts will appear sufficiently from the judgment.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the plaintiffs in a suit for declaration of title to land and for recovery of joint possession thereof along with the defendants. The land in dispute is included in an estate owned jointly by the plaintiffs and the defendants. Both the plaintiffs and the defendants were dispossessed by the proprietor of a neighbouring estate who took possession of the land on the assertion that it formed part of his estate. Subsequently, the defendants took a lease of this land from the adverse possessor. The plaintiffs assert that as the defendants are their co-sharers,

* Appeal from Appellate Decree No. 3914 of 1913 against the judgment and decree of Babu Siddheswar Chakrabarti, Subordinate Judge, Faridpore, dated 22nd August 1913 affirming those of Babu Bhubaneswar Banerjee, Munsiff, Madaripur, dated 24th June, 1912.

(1) (1855) 2 K. & J. 79; 110 R. R. 107.

(2) (1912) App. Cas. 230.

(3) (1914) 21 C. L. J. 253.

their possession cannot be treated as adverse to them. The Courts below have concurrently overruled this contention, which appears to us to be wholly unfounded.

Reliance has been placed by the plaintiffs on the decision of the Judicial Committee in the case of *Cerea v. Appuhamy* (1) where Lord Macnaghten stated, with regard to the possession of a co-owner, that his possession is in law the possession of his co-owner, and it is not possible for him to put an end to that possession by any secret intention in his mind; nothing short of ouster or something equivalent to ouster can bring about that result. That doctrine has no application to the circumstances of the present case. Here the possession of the plaintiffs was not terminated by the defendants. The possession of both of them was terminated by a hostile claimant. The defendants subsequently came into possession under a lease granted by the claimant. Their possession must be referred to the title which they acquired under the lease and not to their title as co-owners of the property held by them and the plaintiffs jointly. No doubt, as observed by Wood V. C. in *Thomas v. Thomas* (2), possession is never considered adverse, if it can be referred to a lawful title. Here, however, the possession of the defendants, is referable only to their title as lessees under a person who claims to hold adversely both to the plaintiffs and the defendants. We must, consequently, hold, on the principles explained in *Lokenath Singh v. Dhakeswar Prosad* (3) that there was an ouster of the plaintiffs by the defendants, and as that ouster has continued for more than 12 years, the title of the plaintiffs has been extinguished.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

D. K. R.

Appeal dismissed.

(1) (1912) App. Cas. 230.

(2) (1855) 2 K. & J. 79 ; 110 R. R. 107.

(3) (1914) 21 C. L. J. 253.

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Bhagabati.

Mookerjee, J.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir
Asutosh Mookerjee, Knight, Judge.*

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DWARIKA NATH ROY CHOUDHURY

v.

MATHURA NATH ROY CHOUDHURY AND OTHERS.*

*Ejectment—Permanent lease—Covenant for re-entry upon an involuntary sale—
Lease in perpetuity, if forfeitable—Mortgage—Sale in execution of mortgage
decree—Auction-purchaser, status of—Right of re-entry, where reserved and
where not—Lessor, remedy of—Forfeiture, when takes place—Election by
lessor—Bengal Tenancy Act (VIII of 1885), Secs. 155, 188, Sch. III.
Art. 1—Forfeiture, effect of, on under-lease—Limitation Act (IX of 1908),
Sch. I. Art. 142—Fractional landlord, suit by.*

Per Curiam : A covenant for re-entry by the landlord upon an involuntary sale is valid and operative in law.

Per Sanderson, C. J : Where the execution sale is directly due to voluntary act of the lessees in the execution of a mortgage, and omission to pay the mortgage debt, the assignment cannot be said to be *ad invitum*.

Per Mookerjee, J : An involuntary alienation may in one sense be attributed to a remote act of the party, quite as much as a voluntary alienation. But this does not place a voluntary and an involuntary alienation on the same footing.

Doe v. Carter (1) ; and *Croft v. Lumley* (2) referred to.

Per Curiam : Section 155 of the Bengal Tenancy Act being applicable only to a suit for the ejectment of a tenant who has forfeited his tenancy by breach of a covenant, cannot be invoked by a purchaser of a permanent tenure in execution sale, which was forfeited by a condition in the lease.

A suit against such a purchaser for ejectment is not governed by article 1 of schedule III of the Bengal Tenancy Act, but by article 142 of the first schedule of the Limitation Act.

Such a purchaser being a trespasser, can be ejected by a fractional landlord, and section 188 of the Bengal Tenancy Act has no application.

Radha Proshad v. Esuf (3) followed.

Per Mookerjee, J : A lease in perpetuity is forfeitable for breach of covenant, notwithstanding that it is permanent.

Abhiram v. Syama Charan (4) followed.

* Letters Patent Appeal No. 52 of 1913 against the decision of Mr. Justice Chapman, dated the 19th March, 1913 in Appeal from Appellate Decree No. 1285 of 1910, against the decree of Babu Revati Kanta Nag, 2nd Subordinate Judge of Backergunge, dated the 11th December, 1909, affirming that of Babu Jogesh Chandra Guha, Munsiff 6th Court at Barisal, dated the 15th September, 1908.

(1) (1798) 8 T. R. 5 ; (1799) 8 T. R. 300.

(2) (1855) 5 El. & Bl. 648 (679) ; 103 R. R. 663 (681).

(3) (1881) 1 L. R. 7 Calc. 414.

(4) (1909) L. R. 36 I. A. 148 (167) ; 1 L. R. 36 Calc. 1003 ; 10 C. L. J. 284.

Where there is a covenant in the lease against alienation but no right of re-entry is reserved in the landlord, the remedy of the latter is either by way of injunction against an apprehended breach, or by recovery of damages for a breach already committed.

Where the lease reserves a right of re-entry, the landlord is not entitled to the reliefs by injunction or damages, but may at his choice treat the lease as forfeited and exercise his right of re-entry.

Where, however, the landlord indicates his election to take advantage of the forfeiture, the forfeiture takes effect from the moment of breach, namely, from the date of alienation. The election is not a condition precedent to the right of action but the institution of the suit itself is a sufficient manifestation of the exercise of the option of the lessor to treat the lease as determined.

Where the lessee has created an underlease or any other legal interest, if the lease is forfeited, then the underlessee or the person who claims under the lessee, loses his estate as well as the lessee himself, but if the lessee surrenders, he cannot, by his own voluntary act in surrendering, prejudice the estate of the underlessee or the person who claims under him.

Great Western Ry. Co. v. Smith (1) followed.

Appeal by Defendant No. 1.

Suit for declaration of title and for ejectment of defendant No. 1.

Plaintiffs were owners of 12 annas and defendant No. 8, the remainder, of certain lands. Defendants Nos. 2 and 3 held the lands under a permanent lease which was granted by the plaintiffs and defendant No. 8. The lease contained a covenant that the tenants would not be competent to make any manner of transfer such as sale, gift, mortgage etc., but would only hold and enjoy the land which could not also be sold for their debts. The lease further provided that if the land was transferred or sold by auction, it would come into the *khas* possession of the landlords. The tenants, in contravention of this covenant, executed a mortgage in favour of defendant No. 1. In 1893 the mortgagee obtained a decree, and, in execution thereof, himself purchased the property on the 24th July, 1897. The sale was confirmed on the 29th November, 1897, and the execution Court delivered possession to the decree-holder purchaser on the 23rd November, 1898. The second and third defendants, as also some of the other defendants, subsequently came into possession of portion of the land under sub-leases granted by the first defendant. On the 20th March, 1908, the plaintiffs commenced this suit for ejectment of the defendants as trespassers, and the owners of the remaining one-fourth share were added as *pro-forma* defendants. The Court of first instance decreed the suit, and that decree was affirmed successively by the Subordinate Judge and Mr. Justice Chapman.

(1) (1876) 2 Ch. D. 235 (253).

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Dr. Sarat Chandra Basak and *Babu Romesh Chandra Sen* for the Appellant.

Babus Joges Chunder Roy, Biraj Mohon Mojumdar and *Abinas Chandra Guha* for the Respondents.

The following judgment was delivered by

Chapman, J.—Defendants two and three were the holders of a permanent lease. There was a clause in the lease giving the landlord right of entry in the event of a transfer or a sale in execution. Defendants two and three mortgaged their leasehold to defendant No. 1. Defendant number one sued upon the mortgage and purchased the rights of defendants 2 and 3 at the sale in execution. The plaintiffs claiming to be the sixteen anna landlords sued in agreement under the forfeiture clause in the lease above referred to. It was held that the plaintiffs were entitled to a 12 annas share only. The plaintiffs obtained a decree for joint possession with defendant number one to the extent of their twelve annas share. Defendant number one appeals.

The first contention in appeal is that limitation began to run from the date of the mortgage. I am however of opinion that the sale in execution provided a fresh ground for forfeiture and the suit is within time counting from the date of the sale.

The next ground taken is that the condition providing for re-entry in the event of a sale in execution was void. It is said that such a condition can legally provide against private transfer only. It is however now settled law that a condition providing for re-entry in the event of a sale in execution is valid.

It is then pleaded that the Transfer of Property Act was applicable to the case and that under section 111 (g) of that Act, the plaintiffs having been found to be landlords to the extent only of a share were not entitled to succeed. Much has been said upon the question whether the Transfer of Property Act was applicable to the case. It has been pointed out that in the Lower Courts it was assumed that the Bengal Tenancy Act was the Act applicable. The fact is that the Bengal Tenancy Act did apply. Defendants two and three were raiyats at fixed rates [*Hurry Ram v. Nursingh Lal* (1)]. But the land being horticultural and not agricultural the provisions of section 111 of the Transfer of Property Act were applicable. It has been laid down in the case of *Gopal Ram Mohuri v. Dhakeshwar Pershad Narain Sing* (2) that one of the several co-sharer landlords cannot succeed by himself in a suit for ejectment upon the ground of forfeiture.

(1) (1893) I.L.R. 21 Calc. 129. (2) (1908) I.L.R. 35 Calc. 807 ; 7 C. L. J. 483.

The lessees were however raiyats and having regard to that fact, I am clear that upon the pleadings as between defendant number one and the plaintiffs taken with the findings in the case there was clearly an implied surrender or abandonment. It is common ground in the pleading that defendants two and three have given up possession of the land except the portion on which the dwelling house stands which they now hold as tenant under defendant number one. Defendants two and three have ceased to pay rent to the plaintiffs. Their leasehold was publicly sold and they accepted the sale as valid.

The Munsiff states that defendant number three (defendant two is a woman) has denied that the plaintiffs are their landlords. Defendants two and three did not appeal from the Munsiff's decision to this court. These facts might not perhaps be considered sufficient to constitute surrender in English Law: but they are well within the principle of the cases upon the subject of surrender by a raiyat. I need only refer to the case of *Kali Nath Chakraverty v. Upendra Chandra Chowahury* (1).

I am of opinion that there was an implied surrender or abandonment. In such a case a co-sharer landlord is entitled to sue in ejectment and get a decree for joint possession.

The appeal is dismissed with costs.

Against this decision, defendant No. 1 preferred this appeal under section 15 of the Letters Patent.

Dr. Sarat Chandra Basak and *Babu Romesh Chandra Sen* for the Appellant.

Babus Joges Chunder Roy, *Biraj Mohon Mojumdar* and *Abinas Chunder Guha* for the Respondent.

C. A. V.

The judgments of the Court were as follows :

Sanderson, C. J.—This is an appeal by the first defendant against the judgment of Mr. Justice Chapman, who dismissed the appeal from the judgment of the Subordinate Judge, which affirmed the decree of the learned Munsiff.

The suit was brought for a declaration of title with respect to certain lands and for the ejectment of defendant No. 1.

In the statement of claim the plaintiff claimed a sixteen annas interest in the said lands but under the decree it was held that their proprietary right was limited to 12 annas: The defendant No. 8 was the owner of the other 4 annas interest in the said lands.

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Defendants Nos. 2 and 3 had held the lands under a lease which was granted by the plaintiffs and defendant No. 8.

The defendants 2 and 3 mortgaged their interests under the lease to the defendant No. 1.

In 1893 defendant No. 1 brought a suit upon the mortgage against defendants Nos. 2 and 3 and obtained a decree.

On the 24th July of 1897, the property was sold under the decree to defendant No. 1.

On the 29th November of 1897, the sale was confirmed.

On 23rd November 1898, possession was given to defendant No. 1.

On 20th March 1908, this suit was instituted.

It is common ground that the defendants Nos. 2 and 3 have given up possession of the land except the portion on which the dwelling-house stands and this they now hold as tenants under the defendant No. 1. Their lease-hold was publicly sold and they accepted the sale as valid, and they have not appealed against the decision of the lower Courts.

The learned Judge in this court has held that there was an implied surrender or abandonment and I think there were admitted facts in the case on which he could come to that conclusion. The lease contained the following words—"We shall not be competent to make any manner of transfer as sale, gift of, etc., and to mortgage, etc., to any one the land of the *miras karsa* but only to hold and enjoy the same, nor can the same be sold for our debts. If the same be transferred or sold by auction or if we or our heirs do not dwell in the said bari, the land constituting the *miras karsa* shall come into your *khas* possession."

The lower Courts held that by reason of this provision in the lease, defendant No. 1 obtained no title by his purchase and consequently the plaintiffs could recover *khas* possession of the property.

The first point urged in this appeal was that the defendant No. 1 was in the position of a tenant and could rely upon section 155 of the Bengal Tenancy Act;—That the lease was only voidable and that until the plaintiffs had taken the steps provided by the said section, defendant No. 1 could not be regarded as a trespasser.

In my judgment, defendants Nos. 2 and 3 had no interest, which they could convey to defendant No. 1, which he must have ascertained on reference to the terms of the lease, and that in the absence of any act done by the plaintiffs, which could be said to be a recognition of the transferee, the defendant No. 1 was in no better position than a trespasser.

Defendant No. 1, therefore, cannot rely on section 155 of the Bengal Tenancy Act, which is not applicable to one in his position [see *Buddhimanta Paramanic v. Sarat Chandra Banerjee* (1)]. It was then urged that the suit was barred by limitation and reliance was placed upon sections 184 and 185 and schedule III(1) of the Bengal Tenancy Act and section 28 of the Limitation Act of 1908. I do not think that the Bengal Tenancy Act applies to the case of defendant No. 1 for the reason already mentioned that he was not a tenant within the meaning of that Act. The sale of the property to the defendant No. 1 was in July 24, 1897 and possession was given to him on the 23rd of November 1898, and the action to recover possession of the lands was brought on the 20th of March 1908, and was, therefore, within the twelve years specified in the Indian Limitation Act. Consequently in my judgment, the suit was not barred by the Limitation Act.

It was next argued that the plaintiffs being merely co-sharer landlords could not determine the lease. This question in my judgment does not arise as between the plaintiffs and the defendant No. 1, who, as above stated, must be treated as a trespasser.

It was then urged that the plaintiffs could not sue in ejectment without joining the defendant No. 8 as plaintiffs: but the defendant No. 1, being no more than an intruder, the plaintiffs were entitled to the decree for *khas* possession of the 12 annas share jointly with this defendant. [see *Radha Proshad Wasti v. Esuf* (2)].

The covenant in question contained a provision for re-entry and, therefore, may be said to have been for the benefit of the lessor and those claiming under him, and inasmuch as the execution sale was directly due to voluntary acts of the lessees *viz.*, the execution of the mortgage, and omission to pay the mortgage-debt, the assignment cannot be said to be *ad invitum*.

Finally it was argued that mesne profits had been allowed from the 23rd of November, 1898, the date of dispossession. The learned Vakil for the respondents agreed that this part of the decree should be modified and the mesne profits should be limited to three years. Subject to such modification, in my judgment, the decree should stand and the appeal be dismissed with costs.

Mookerjee, J.—This is an appeal, under clause 15 of the Letters Patent, from a judgment of Mr. Justice Chapman, who, in concurrence with the Courts below, has decreed the claim of the plaintiffs respondents. The disputed land constituted the permanent tenure of the second and third defendants under a lease granted by

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the landlords on the 29th November, 1886. The lease contained a covenant that the tenants would not be competent to make any manner of transfer such as sale, gift, mortgage etc., but would only hold and enjoy the land which could not also be sold for their debts. The lease further provided that if the land was transferred or sold by auction, it would come into the *khas* possession of the landlords. The tenants, in contravention of this covenant, executed a mortgage in favour of the appellant; whether the landlords ever became aware of this transaction or not has not been investigated; but, we know this much that in 1893 the mortgagee obtained a decree, and, in execution thereof himself purchased the property on the 24th July, 1897. The sale was confirmed on the 29th November, 1897, and the execution Court delivered possession to the decree-holder purchaser on the 23rd November, 1898. It appears that the second and third defendants, (whose possession was thus terminated), as also some of the other defendants, subsequently came into possession of portions of the land under sub-leases granted by the first defendant. On the 20th March, 1908, the plaintiffs commenced this suit for ejectment of the defendants as trespassers. They claimed this relief in respect of the whole land but have been awarded relief in respect of a three-fourths share, as they hold that share only in the superior interest. The owners of the remaining one-fourth share were added as pro forma defendants. The Court of first instance decreed the suit, and that decree has been affirmed successively by the Subordinate Judge and by Mr. Justice Chapman. On the present appeal by the first defendant, the decision of the Courts below has been assailed substantially on five grounds, namely, *first*, that the covenant for forfeiture of the lease upon an involuntary sale was bad in law; *secondly*, that if the covenant was valid, the landlords were bound to follow the procedure prescribed in section 155 Bengal Tenancy Act; *thirdly*, that the suit was barred by limitation under Art. 1 of schedule III of the Bengal Tenancy Act; *fourthly*, that a decree for ejectment cannot be made in a suit instituted by a fractional landlord; and, *fifthly*, that the decree should have specified that the plaintiffs are entitled to mesne profits, not from the date of dispossession as claimed in the plaint, but only for three years antecedent to the suit.

As regards the first point, it is plain that as pointed out by the Judicial Committee in *Abhiram v. Syamacharan* (1), a lease in perpetuity is forfeitable for breach of covenant, notwithstanding that it is permanent. It is equally plain that a covenant for re-entry by

(1) (1909) L. R. 36 I. A. 148 (167); I. L. R. 36 Calc. 1003; 10 C. L. J. 284.

the landlord upon an involuntary sale is valid under the law of England. This is conclusively established by the decisions in *R. v. Topping* (1) and *Davis v. Eyton* (2). In the latter case, Tindal C. J. observed, with reference to a covenant of this description, that the estate of the lessee was certain at first, but liable to be defeated by a condition which he allowed to be inserted in the contract and which was a lawful condition ; it was sufficient that the condition was broken, to see that the landlord entered on his title paramount and took the property then as he had it originally. [See also *Doe v. Galliers* (3) ; *Doe v. Hawke* (4) ; *Cooper v. Wyatt* (5) ; *Yarnold v. Moorhouse* (6)]. We have also the high opinion of Sir Charles Sargent C. J. in *Vyankatraya v. Shivram-bhat* (7) that the same rule is applicable in India, although section 12 of the Transfer of Property Act expressly mentions the case of forfeiture for bankruptcy and does not specifically refer to the case of forfeiture for involuntary alienation : *Mahananda v. Saratmani* (8). It may also be observed that, as explained in the case of *Ram Pershad v. Jawahir* (9), in connection with a question of abandonment by a tenant, an involuntary alienation may in one sense be attributed to a remote act of the party, quite as much as a voluntary alienation ; *Doe v. Carter* (10) ; see also the judgment of Lord Campbell C. J. in *Croft v. Lumley* (11) ; as also the contrary opinion of Baron Alderson in the Exchequer Chamber, and of Lord Wensleydale in the House of Lords : *Croft v. Lumley* (12) ; this analogy, however, does not justify the view that a covenant for forfeiture for voluntary alienation includes by implication a covenant for forfeiture for involuntary alienation. I hold accordingly that the covenant in question is valid and operative in law.

As regards the second ground, it is plain that section 155 of the Bengal Tenancy Act which prescribes the mode whereby relief may be granted against forfeiture, is applicable only to a suit for the ejectment of a tenant who has forfeited his tenancy by breach of a covenant. The first defendant, who has contested the claim of the plaintiff, obviously cannot take shelter under section 155,

(1) (1825) Mc. & You. 544 ; 29 R. R. 839.

(2) (1830) 7 Bing. 154 ; 33 R. R. 408.

(3) (1787) 2 T. R. 133.

(4) (1802) 2 East. 481.

(5) (1821) 5 Madd. 482.

(6) (1830) 1 Rus. & My. 364.

(7) (1883) I. L. R. 7 Bom. 256.

(8) (1911) 14 C. L. J. 585.

(9) (1907) 7 C. L. J. 72 ; 12 C. W. N. 899 (904).

(10) (1798) 8 T. R. 57 ; (1799) 8 T. R. 300 ; 4 R. R. 586.

(11) (1855) 5 El & Bl. 648 (679) ; 103 R. R. 663 (691).

(12) (1858) 6 H. L. C. 672 (742) ; 108 R. R. 252 (289).

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unless he can establish that he is a tenant, that is, that he has acquired by his purchase the tenancy originally held by the second and third defendants. This raises the question of the effect of the execution sale, in other words, did the tenancy pass by the sale to the purchaser and is now liable to be annulled by the plaintiffs, or, has it been forfeited by reason of the very act of the sale. For the correct solution of this question, it is necessary to bear in mind the fundamental distinction between two classes of cases, which has been recognised in a long line of decisions, [*Nil Madhab v. Narattam* (1); *Golak Nath v. Mathura Nath* (2); *Vyankatraya v. Sibrambhat* (3); *Tamaya v. Timapa* (4); *Diwali v. Apaji* (5); *Madar v. Saunabawa* (6); *Basarat v. Manirulla* (7); *Kesav v. Harasit* (8); *In re West Hopetown Co.* (9); *Nitrapal v. Kalyan* (10); *Parameshri v. Vittapha* (11); *Keshab Lal v. Jnanendra Nath* (12); *Doe v. Carter* (13); *Croft v. Lumley* (14); namely, cases where there is a covenant in the lease against alienation, but no right of re-entry reserved in the landlord; and cases where there is a covenant in the lease against alienation coupled with a clause for re-entry. In the first class of cases, the lease is not forfeited by breach of covenant [*Doe v. Godwin* (15)]; and the remedy of the landlord is either by way of injunction against an apprehended breach [*Bibi Sahodra v. Rai Jung Bahadur* (16); *Bridewell Hospital v. Fawknor* (17); *MacEachern v. Colton* (18)], or, by recovery of damages for a breach already committed [*Williams v. Earle* (19); *Paul v. Nurse* (20); *Weatherall v. Gearing* (21); *Basarat v. Manirulla* (7)]. In the second class of cases, where the lease reserves a right of re-entry, the landlord is not limited to the reliefs by injunction or damages, but may at his choice treat the lease as forfeited and exercise his right of re-entry; as was said, by Maule J. in *Blyth*

(1) (1890) I. L. R. 17 Calc. 826.

(2) (1891) I. L. R. 20 Calc. 273.

(3) (1883) I. L. R. 7 Bom. 256.

(4) (1883) I. L. R. 7 Bom. 262.

(5) (1886) I. L. R. 10 Bom. 342.

(6) (1895) I. L. R. 21 Bom. 195.

(7) (1909) I. L. R. 36 Calc. 745; 10 C. L. J. 49.

(8) (1910) 12 C. L. J. 126.

(9) (1890) I. L. R. 12 All. 192.

(10) (1906) I. L. R. 28 All. 400.

(11) (1902) I. L. R. 26 Mad. 157.

(12) (1914) 20 C. L. J. 332.

(13) (1798) 8 T. R. 57.

(14) (1858) 6 H. L. C. 672.

(15) (1815) 4 M. & S. 265; 16 R. R. 463.

(16) (1881) L. R. 8 I. A. 210; I. L. R. 8 Calc. 224.

(17) (1892) 8 T. L. R. 637.

(18) (1902) App. Cas. 104.

(19) (1868) L. R. 3 Q. B. 739.

(20) (1828) 8 B & C. 486.

(21) (1806) 12 Ves. 504; 8 R. R. 369.

v. *Dennett* (1), the lease becomes not void but voidable, and only the lessor and not the lessee at default can treat the term as at an end [*Bowser v. Colby* (2); *Davenport v. R.* (3); *Doe v. Bancks* (4); *Doe v. Galliers* (5); *Church v. Brown* (6); *Fryer v. Ewart* (7)]; the election by the lessor may be made by express words or by act [*Roberts v. Davey* (8); *James v. Young* (9)], when, however, the landlord indicates his election to take advantage of the forfeiture, the forfeiture takes effect from the moment of breach, namely, from the date of the alienation. We cannot hold that the tenancy continues even after the alienation, because such an assumption is contrary to the very condition of the contract itself, that on the alienation the landlord is entitled to re-enter. Section 111 of the Transfer of Property Act admittedly does not govern the case before us, as the tenancy was of agricultural land (section 117, Transfer of Property Act), and consequently the principle recognised in *Anandamoyee v. Lakhi Chandra* (10) and *Venkatramana v. Gundaraya* (11) that the landlord must prior to the institution of the suit for ejectment have manifested his intention to avail himself of the forfeiture has no application. As pointed out by Krishnaswamy Iyer J. in *Padmanabhaya v. Ranga* (12) and by Sadasiva Iyer, J. in *Korapalu v. Narayan* (13), in this class of cases, where section 111 of the Transfer of Property Act does not apply, the forfeiture is complete when the breach of the condition occurs. Consequently, the election is not a condition precedent to the right of action, but the institution of the suit itself is a sufficient manifestation of the exercise of the option of the lessor to treat the lease as determined. The technicalities which at one time hedged in the English Law on the subject are well illustrated by the cases of *Goodright v. Cator* (14); *Jones v. Carter* (15); *Greenwood v. Moss* (16); *Clough v. London & N. W. Ry. Co.* (17); *Evans v. Davis* (18); *Serjeant v. Nash & Co.* (19), and they need not be

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(1) (1853) 13 C. B. 178 (180).

(2) (1841) 1 Hare. 109.

(3) (1877) 3 App. Cas. 115 (128).

(4) (1821) 4 B. & Ald. 401 (406).

(5) (1787) 2 T. R. 133; 1 R. R. 445

(6) (1808) 15 Ves. 258; 10 R. R. 74.

(7) (1902) App. Cas. 187.

(8) (1833) 4 B. & Ald. 664 (671).

(9) (1884) 27 Ch. D. 652 (662).

(10) (1906) I. L. R. 33 Calc. 339; 3 C. L. J. 274.

(11) (1908) I. L. R. 31 Mad. 403.

(12) (1910) I. L. R. 34 Mad. 161 (164). (13) (1913) 25 M. L. J. 315.

(14) (1780) 2 Douglas 477.

(15) (1846) 15 M. & W. 718; 71 R. R. 800.

(16) (1872) L. R. 7 C. P. 360.

(17) (1871) L. R. 7 Ex. 26 (34).

(18) (1878) 10 Ch. D. 747 (763).

(19) (1903) 2 K. B. 704.

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needlessly introduced here. In the case before us, it is, in my opinion, plain that no title passed to the first defendant by the execution sale; the landlord has not waived the forfeiture by receipt of rent or otherwise, and the forfeiture must be held to have taken effect from the date of sale. The first defendant thus cannot take advantage of Sec. 155 of the Bengal Tenancy Act as he is not a tenant but a trespasser. The original tenants are quite content with the decree for ejectment and do not claim to be relieved against forfeiture: *Buddhimanta v. Sarat* (1). If they are now in occupation of any portion of the land, they do not claim to do so as tenants under the plaintiffs; they have repudiated the tenancy under the plaintiffs and have attorned to the appellant; their title, if any, must now fall with that of their new lessor: *Kallinath v. Upendra* (2). As Mellish L. J. said in *Great Western Ry. Co. v. Smith* (3), affirmed in *Smith v. Great Western Ry. Co.* (4), it is a rule of law that if there is a lessee and he has created an underlease or any other legal interest, if the lease is forfeited, then the underlessee or the person who claims under the lessee, loses his estate as well as the lessee himself, but if the lessee surrenders, he cannot, by his own voluntary act in surrendering, prejudice the estate of the underlessee or the person who claims under him. In my opinion, the second ground is entirely untenable and the defendants are liable to be ejected as trespassers.

As regards the third ground, reliance is placed upon schedule III, Art. 1 of the Bengal Tenancy Act which provides that a suit to eject a tenure-holder or ryot, on account of a breach of condition in respect of which there is a contract expressly providing that ejectment shall be the penalty of such breach, must be instituted within one year from the date of the breach. This argument must be overruled on the same grounds as the second contention. The suit is for the ejectment of a trespasser and of persons deriving title from him, and is consequently governed by Art. 142 of the Schedule to the Limitation Act. The third contention accordingly fails.

As regards the fourth ground, it is obvious that as the first defendant and those that claim title under him are in the position of trespassers, the plaintiffs are entitled to recover possession of the disputed land in respect of their own share; section 188 of the Bengal Tenancy Act has no application; nor do any equitable considerations come into play, such as might possibly have opera-

(1) (1910) 13 C. L. J. 672.

(3) (1876) 2 Ch. D. 235 (253).

(2) (1896) 1 L. R. 24 Calc. 212.

(4) (1877) 3 App. Cas. 165.

ted, [*Watson v. Ramchund* (1); *Hossein v. Fakir* (2)] if a co-sharer landlord had sought to eject a tenant brought upon joint undivided land by another co-sharer [*Radha Proshad v. Esuf* (3); *Dilbar v. Hosein* (4); *Bhikari v. Dhakeswar* (5)]. The fourth ground consequently fails.

As regards the fifth ground, it is not disputed by the plaintiffs that the mesne profits must be limited to 3 years antecedent to the suit and could not be claimed for the entire period between the date of dispossession (23rd November 1898) and the recovery of possession under the decree in this suit. The decree must be amended in this respect.

The result follows that subject to variation in respect of mesne profits the decree under appeal will stand affirmed with costs.

A. T. M.

Decree varied.

- (1) (1890) I. L. R. 18 Calc. 10. (2) (1909) 10 C. L. J. 618.
 (3) (1881) I. L. R. 7 Calc. 414. (4) (1899) I. L. R. 26 Calc. 553.
 (5) (1908) 7 C. L. J. 483; I. L. R. 35 Calc. 807.

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1916.

Dwarika

v.

Mathura.

Mookerjee, J.

CRIMINAL REFERENCE.

Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice Sheepshanks.

RAVAN KHAN AND OTHERS

v.

EMPEROR*

Code of Criminal Procedure (Act V of 1908) sections 110 and 122—Surety, rejection of—Judicial enquiry—Want of sufficient control over the accused not a good ground of rejection.

The question whether a particular person who is offered as a surety is or is not fit, within the meaning of section 122 of the Criminal Procedure Code, must be decided by the magistrate himself, upon evidence taken for the purpose; sureties offered should not be refused except after judicial enquiry.

Suresh Chandra v. Emperor (1), *In re Abdul Khan* (2), *Akbar Ali v. King Emperor* (3) and *Kalu Mirza v. Emperor* (4) followed.

* Criminal Reference No. 73 of 1916 (undefended) by C. Tindell Esq., Sessions Judge, Bankura, dated the 13th May, 1916 against an order of H. K. Mullick Esq., Subdivisional Magistrate, Bankura, dated the 23rd March, 1916.

- (1) (1904) 3 C. L. J. 575. (2) (1906) 10 C. W. N. 1027.
 (3) (1914) I. L. R. 42 Calc. 706. (4) (1909) I. L. R. 37 Calc. 91.

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May, 24.

CRIMINAL.

1916.

Rayan
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Emperor.

Rejection of sureties on the ground that they do not show that they have sufficient control over the accused is not valid in law.

Kalu Mirza v. Emperor (1) and *Jivanatha v. Emperor* (2) referred to.

Reference under-section 438 of the Code of Criminal Procedure.

The material facts of the case appear from the following

ORDER OF THE COURT.

May, 24.

In a proceeding under section 110, Criminal Procedure Code, the petitioners were directed on the 1st December, 1915 to execute bonds for Rs. 200 with two sureties each, to be of good behaviour for one year in some cases, and for three years in other cases—in default to undergo rigorous imprisonment for their respective periods. This order was made by Mr. H. K. Mallik, Sub-Divisional Magistrate, Bankura. On the 24th and 26th January, 1916, the petitioners produced two sureties each, who offered to stand as sureties and filed documents of title relating to their properties. On the 28th January, the Magistrate recorded the following order: "To Police for enquiry, if the surety is fit; forward documents also." As the Police did not submit the report on the day fixed, the case was adjourned. The Sub-Inspector of Police subsequently reported in the following terms: "The proposed sureties are not fit. They have no sufficient control over the accused and they have no sufficient (property?) to pay the amount in case of default; so under the circumstances I cannot recommend this." The Inspector of Police forwarded this report to the Magistrate with the note "not recommended." The Magistrate thereupon recorded the following order on the 11th February, 1916. "Rejected. Let them furnish other good surety." The result was that the petitioners were all lodged in jail. The Sessions Judge has now forwarded the records to this Court with the recommendation that the order of the Magistrate be set aside, on the ground that the sureties were rejected without judicial enquiry by the Magistrate himself.

It is well settled that the question whether a particular person who is offered as a surety is or is not fit, within the meaning of section 122, Criminal Procedure Code, must be decided by the Magistrate himself, and his decision must be based upon evidence taken for the purpose; sureties offered should not be refused except after judicial enquiry. This view is supported by a long line of cases in this Court which are binding upon us and our Subordinate Courts: *Suresh Chandra v. Emperor* (3), *In re Abdul Khan* (4), *Akbar Ali*

(1) (1909) I. L. R. 37 Cal. 91.

(2) (1914) 16 Bom. L. R. 138; 15. Cr. L. J. 268.

(3) (1904) 3 C. L. J. 575.

(4) (1906) 10 C. W. N. 1027.

v. *King Emperor* (1), *Kalu Mirza v. Emperor* (2). In the case last mentioned, Coxe, J. doubted whether the enquiry might not be delegated to a Subordinate Magistrate. Ryves, J., however, followed what has undoubtedly been the consensus of opinion in all the superior Courts in this country, namely, that the Magistrate should himself hold the enquiry into the fitness of the proposed sureties and cannot call upon other persons to exercise the functions which are entrusted by law to him alone. Amongst the cases in Allahabad, reference may be made to the decisions in *Queen Empress v. Pirthi Pal* (3), *Emperor v. Tota* (4), *Emperor v. Gulam Mustafa* (5), *Emperor v. Balwant* (6), *Bhawani v. King Emperor* (7). The same view has been adopted in the Court of the Judicial Commissioner of Oudh : *King Emperor v. Parmeshur* (8), *Ramanand v. King Emperor* (9), *Jaigovind v. Emperor* (10). A similar view has been adopted by the Chief Court of the Punjab, [*King Emperor v. Kaim Khan* (11)], and also by the Court of the Judicial Commissioner of Sind [*Emperor v. Malukdino and Mahro* (12), *Emperor v. Kamal* (13), *R. v. Allahdino* (14), *Emperor v. Haji Usman* (15), *Piru v. Emperor* (16), *Muhammad Ibrahim v. Emperor* (17). We accordingly accept the recommendation of the Sessions Judge, set aside the order of the Magistrate, dated the 11th February, 1916, and remand the case to him in order that he may enquire into the fitness of the sureties offered upon such evidence as may be adduced before him on behalf of the accused. It may be added that as there are several accused persons each of whom has offered two sureties the fitness of each person must be separately determined ; a general order without investigation of the circumstances of each of the sureties is obviously not contemplated by the law.

As the question of fitness of each surety will be determined by the

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(1) (1914) I. L. R. 42 Calc. 706 ; 19 C. W. N. 220.

(2) (1909) I. L. R. 37 Calc. 91.

(3) (1898) All. W. N. 154.

(4) (1903) I. L. R. 25 All. 272.

(5) (1904) I. L. R. 26 All. 371.

(6) (1904) I. L. R. 27 All. 293.

(7) (1914) 12 A. L. J. R. 1004.

(8) (1904) 7 O. C. 113 ; 1 Cr. L. J. 459.

(9) (1908) 11 O. C. 267 ; 8 Cr. L. J. 344.

(10) (1912) 15 O. C. 263 ; 13 Cr. L. J. 760.

(11) (1906) P. R. 18 ; 3 Pun. Cr. R. 2910.

(12) (1908) 2 S. L. R. 11 ; 10 Cr. L. J. 225.

(13) (1908) 2 S. L. R. 15 ; 10 Cr. L. J. 230.

(14) (1911) 5 S. L. R. 87 ; 12 Cr. L. J. 410.

(15) (1910) 4 S. L. R. 18 ; 11 Cr. L. J. 497.

(16) (1913) 7 S. L. R. 94 ; 15 Cr. L. J. 378.

(17) (1914) 8 S. L. R. 178 ; 16 Cr. L. J. 100.

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Magistrate after enquiry, it is not necessary for us to specify the elements to be taken into consideration by him ; but with reference to the observation in the police report that sureties should be rejected if they do not show that they have sufficient control over the accused we may draw the attention of the Magistrate to the fact that according to the decisions of this Court this is not a valid ground for rejection of a surety : *Kalu Mirza v. Emperor* (1). The same view has been adopted by the Bombay High Court in a recent case, *Jivanatha v. Emperor* (2), though a somewhat different view is possibly indicated in *Queen Empress v. Rohim Bakhsh* (3), and *Zikri v. Emperor* (4).

Let the records be returned.

S. C. R. C.

Case Remanded.

- (1) (1909) I. L. R. 37 Calc. 91 (101).
(2) (1914) 16 Bom. L. R. 138 ; 15 Cr. L. J. 268.
(3) (1898) I. L. R. 20 All. 206.
(4) (1911) 8 All. L. J. 785 ; 12 Cr. L. J. 472.

*Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice
Sheepshanks.*

CRIMINAL.
1916.
May, 12.

KAMAL MANDAL AND ANOTHER

v.

KING EMPEROR.*

*Code of Criminal Procedure (Act V of 1908), sections 35 (1) and 397—Jail Code,
Rule 526, Exp. 1—Different trials—Concurrent sentences—Illegal order.*

An order directing that the sentences in two different cases do run concurrently, is illegal.

Section 35 (1) of the Code of Criminal Procedure authorises a court to direct that several punishments passed on an accused for two or more distinct offences do run concurrently only when such sentences have been passed on him at one trial. It is not competent to a court to give such a direction when the sentences have been passed in different trials.

Empress v. Bhagawandas (1), *Emperor v. Tuka Ram* (2) and *Girdhari Lal v. Emperor* (3) referred to.

* Criminal References Nos. 61 and 62 of 1916 (undefended) by R. C. Hamilton Esq. Magistrate of Jessore, dated the 15th April, 1916 against conviction and sentences by S. N. Mookerjee Esq., Sub-Deputy Magistrate of the 2nd Class, Narail, dated the 3rd January, 1916.

- (1) (1900) 2 Bom. L. R. 111. (2) (1902) 4 Bom. L. R. 876.
(3) (1911) 12 Cr. L. J. R. 217.

References under section 438 (1) of the Code of Criminal Procedure.

The material facts of the case will appear from the following judgment of the Court:—

These are references under sec. 438 (1), Criminal Procedure Code made by the District Magistrate of Jessore. The facts are not in dispute and may be briefly stated ; on the night of 10th October 1915, a burglary with theft was committed in the house of one Bijoylal Ghosh of Raigram. On the 12th December, 1915, another burglary with theft was committed in the house of one Bijoygopal Roy of the same village. In the course of the investigation in the second case the Police discovered the stolen articles of Bijoylal Ghosh as also those of Bijoygopal Roy from the huts and from underneath a heap of straw in the court-yard of the two accused Kamal Mandal and his son Purna Mandal. Two separate cases were thereupon instituted against both the accused one in respect of each incident. The trials were separately held and separate judgments were delivered. The Sub-Deputy Magistrate sentenced each accused to undergo rigorous imprisonment for six months in each case and he ordered that the sentences in the two cases should run concurrently. Appeals were preferred to the District Magistrate as the trials had been held by a Sub-Deputy Magistrate of the Second Class. The appeals were summarily rejected. It was subsequently brought to the notice of the District Magistrate that the order that the sentences in the two cases should run concurrently was irregular under Jail Code, Rule 526, Exp. 1. An explanation was called for from the Sub-Deputy Magistrate who stated that his intention was that each accused should in all undergo rigorous imprisonment for 6 months, taking together the sentences in both the cases. The District Magistrate has now referred the case to this court with the recommendation that the sentence in each case be reduced to rigorous imprisonment for 3 months and the two sentences be ordered to run consecutively or that a fresh trial be directed.

It is obvious that the order of the Sub-Deputy Magistrate that the sentences in the two cases do run concurrently is illegal. Section 35 (1) Criminal Procedure Code authorises a court to direct that several punishments passed on an accused for two or more distinct offences do run concurrently only when such sentences have been passed on him at one trial. It is not competent to a court to give such a direction when the sentences have been passed in different

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trials (Sec. 397 of Criminal Procedure Code) *Empress v. Bhagawan-das* (1) ; *Emperor v. Tuka Ram* (2) ; *Girdharilal v. Emperor* (3). It may be pointed out that under section 46 of Act XXV of 1861 such a direction could have been given when the accused was convicted of more than one offence *at one time* ; in section 314 of Act X of 1872 the phrase "at one *trial*" was substituted for "at one *time* and any possible ambiguity in the section due to the use of the latter phrase was thus removed : *Queen v. Puban* (4). We accordingly accept the recommendation of the District Magistrate, reduce the sentence upon each accused in each case to rigorous imprisonment for three months and direct that the sentences in the two cases do run consecutively.

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Sentences to run consecutively.

(1) (1900) 2 Bom. L. R. 111.

(2) (1902) 4 Bom. L. R. 876.

(3) (1911) 12 Cr. L. J. R. 217.

(4) (1867) 7 W. R. 1 Cr.

CRIMINAL REVISION.

Before Mr. Justice Chitty and Mr. Justice Walmsley.

CHAIRMAN OF HOOGHLY-CHINSURAH MUNICIPALITY

v.

KRISTO LALL MALLIK.*

CRIMINAL.

1916.

April, 14.

Bengal Municipal Act (III of 1884, B. C.), Secs. 44, 45, 230, 271, 353—Complaint—Order or consent of the Commissioners—Chairman, powers of—Order or consent, if to be under the seal of the Municipality—Consent of the Chairman, if validates act done by the Vice-Chairman.

A report having been made by the outdoor inspector of a Municipality the accused was prosecuted under section 271 of the Bengal Municipal Act for having disobeyed a requisition under section 230 of the Act. In the remarks column of that report, which bore an eight-anna stamp, occurred a remark by the Chairman of the Municipality by which he submitted it to the District Magistrate with a recommendation to prosecute the party under sections 230 and 271 of the Act. The outdoor inspector was subsequently examined before the Magistrate. The accused was then convicted of the offence :

Held that, the Chairman of the Municipality was not in the position of the complainant, and the report could not be regarded as a petition of complaint, although it bore an eight-anna stamp.

Held also, it was clearly an order or consent by the Chairman as representing the Commissioners, within the meaning of section 353 of the Act, inasmuch as the sanction for prosecution of a public authority need not be under the seal of that authority.

Rasul Buksh v. Municipal Board of Chapra (1) dissented from.

Held further, that although in the case notice against the accused was issued on the authority of the Vice-Chairman, there was a sufficient compliance of the law as express consent of the Chairman was subsequently obtained as indicated in the remarks column aforesaid.

Kheroda Prosad Paul v. The Chairman of the Howrah Municipality (2) distinguished.

Reference under section 438 of the Code of Criminal Procedure.

The Accused, Kristo Lall Mallik, was prosecuted at the instance of the Chairman of the Municipality of Hooghly-Chinsurah for having constructed a privy, without the written permission of the Municipal Commissioners, within 50 feet of a tank alleged to be used by the inhabitants of the locality. The accused was then convicted by the Sub-Divisional Magistrate of Hooghly under section 271 of the

* Criminal Revision, No. 52 of 1916, upon a reference by S. K. Ghose, Esq., District Judge of Hooghly.

(1) (1912) 16 C. W. N. 934.

(2) (1893) I. L. R. 20 Calc. 448.

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1916.

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Kristo.

Bengal Municipal Act, for having disobeyed a requisition under section 230, and sentenced to pay a fine of Rs. 5, and also to pay a daily fine of 8 As. from 31st May, 1915 to 22nd July, 1915, in default to suffer simple imprisonment for a fortnight, and also to pay Rs. 2-12 as. as costs. Against that order the accused moved the Sessions Judge of Hooghly, and the learned Sessions Judge recommended that the order might be set aside.

Babu Atulya Charan Bose for the Accused.

Babu Manmatha Nath Mukherjee for the Opposite Party.

The judgment of the Court was as follows :—

April, 14.

This is a Reference by the learned Sessions Judge of Hooghly in the matter of one Kristo Lall Mallik who was prosecuted under section 271 of the Bengal Municipal Act for having disobeyed a requisition under section 230 and sentenced to pay a fine. The learned Sessions Judge recommends that the conviction and sentence be set aside on two grounds which he admits are technical. The first is that the prosecution was undertaken without the consent of the Commissioners. He concedes that, under section 44, the Chairman could give such consent. It appears from Ex. 3 in the case that the report of this offence was made by the outdoor inspector ; that the columns of that form were duly filled up ; and that in the remarks columns occurred this remark "submitted to the District Magistrate, Hooghly, with a recommendation to prosecute the party under sections 230, 271 of the Bengal Municipal Act." That is signed by Mohendra Chandra Mitter, Chairman, Hooghly-Chinsurah Municipality. The learned Judge thinks that, because this document bears an 8-anna stamp, it must be regarded as a petition of complaint and that the Chairman of the Municipality was merely in the position of the complainant. We do not so regard it. Section 353 says that no prosecution for an offence under this Act shall be instituted without the order or consent of the Commissioners. This is clearly an order or consent by the Chairman as representing the Commissioners. It does not appear that the Chairman ever went before the District Magistrate ; the complainant who appeared before him was the outdoor inspector ; and he gave evidence as such complainant as appears from his deposition. We have been referred on this point to a decision of this Court in *Rasul Buksh v. Municipal Board of Chapra* (1), in which the Judges are reported to have remarked : "The only evidence of sanction of prosecution of a public authority is a writing under the

seal and signature of that authority." We have not been told of any enactment which requires a sanction for prosecution to be under seal. The facts of that case were somewhat different from the facts of the present case ; but, so far as the seal was held to be necessary, we are unable to agree with that in the absence of any legislative enactment to that effect. The expression there "sanction of prosecution" is not quite in the wording of section 353 which speaks of the "order or consent." Ex. 3 amounting to such order or consent in writing by the Chairman is, we think, sufficient.

The second point is that the notice, Ex. 1 against the accused was issued on the authority of the Vice-Chairman and that there is no evidence that the latter derived authority from the Chairman. The learned Judge has referred to sections 44 and 45 ; but he has not directly referred to the proviso to section 45. Here it may be assumed that there was no written order delegating to the Vice-Chairman all or any of the duties or powers of a Chairman as defined in the Act which would cover the particular order made by the Vice-Chairman in this case. The proviso, however, to section 45 says : "Provided that nothing done by the Vice-Chairman which might have been done under the authority of a written order from the Chairman, shall be invalid for want of or defect of such written order, if it be done with the express or implied consent of the Chairman previously or subsequently obtained." That the act of the Vice-Chairman was done with the express consent of the Chairman subsequently obtained is clear in this case from the order to which we have referred in Ex. 3. It is clear that the Chairman must have given consent to the act of the Vice-Chairman ; or he could never have written that order which has been designated a sanction to prosecute. On this point we have been referred to the case of *Kheroda Prosad Paul v. The Chairman of the Howrah Municipality* (1). But the facts there were very different from the facts in the present case. There was no evidence of any such consent on the part of the Chairman as appears here. All that there was in that case to justify the order was a verbal order given some months before by the Chairman to the Vice-Chairman to institute all prosecutions under section 353.

We think, therefore, on the clear reading of the Act that the two points which the learned Judge has put forward cannot be supported. His recommendation to revise the proceedings is rejected.

A. N. R. C.

Reference discharged.

(1) (1893) I. L. R. 20 Calc. 448.

CRIMINAL.

1916.

Chairman of
Hooghly-Chinsurah
Municipality.

v.

Kristo.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Richardson.

CIVIL.

1915.

February, 25.

AFTAR ALI AND OTHERS

v.

BROJENDRA KISHORE ROY CHOWDHURY.*

Purchaser, rights of—Sale on account of arrear of land revenue—Unrecorded proprietor of the estate—Title acquired by adverse possession—Assam Land and Revenue Regulation (I of 1886), secs. 63, 70, 71.

On a sale held under section 70 of the Assam Land and Revenue Regulation on account of an arrear, a person who has acquired a good title by adverse possession against the original proprietor at the time of sale, is a defaulter and cannot assert a good title as against the purchaser, an unrecorded proprietor of the estate.

What is sold is the estate and the purchaser is entitled to take that estate as against the defaulting proprietors.

Appeal by the Defendants.

Suit for declaration of title to immovable property and for recovery of possession thereof with mesne profits.

The material facts and arguments appear from the judgment.

Babu Gurudas Sinha for the Appellants.

Babus Dwarka Nath Chuckerbutty and Ramani Mohan Chatterjee for the Respondent.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the defendants in a suit for declaration of title to immovable property and for recovery of possession thereof with mesne profits. The litigation, which was commenced on the 24th August, 1900, and has lasted well nigh for fifteen years, has passed through various stages ; but the facts material for the decision of the question in controversy at this the final stage may be briefly recited.

The plaintiff purchased an estate sold under the provisions of section 70 of the Assam Land and Revenue Regulation 1886, on the 14th February, 1890. The sale was confirmed on the 23rd August, 1890. The plaintiff asserts that the lands now in dispute are comprised in Mouza Ghora Dumbur included in the estate purchased by

* Appeal from Appellate Decree No. 1686 of 1910, against the decree of G. N. Roy, Esq., District Judge of Sylhet, dated the 12th January, 1910, reversing that of Babu Purna Chandra Banerjee, Subordinate Judge of Sylhet, dated the 30th May, 1903.

him. The defendants contend on the other hand that the lands are comprised in Mouza Pitaboi owned by them ; and they concede that they have no interest in mouza Ghora Dumbar. The Judge has found that according to the thak map prepared in 1861 the lands in dispute are comprised within the estate purchased by the plaintiff ; but he has also found that the defendants have been in possession ever since the time of the thak. The question in controversy is, what are the rights of the plaintiff as purchaser at a sale under section 70 of the Assam Land and Revenue Regulation, 1886, as against the defendants. It is not disputed that the plaintiff at the time of his purchase was an unrecorded proprietor of the estate. Consequently, the provisions of section 71 which lays down that the property sold under section 70 shall be sold free of all encumbrances previously created thereon by any other person than the purchaser, have no application ; for the third clause to the proviso to that section expressly lays down that nothing in the section shall apply when the purchaser is a recorded or unrecorded proprietor or settlement-holder of the estate. The rights of the plaintiff must accordingly be determined with reference to the terms of section 70 alone. That section is in these terms : when an arrear has accrued in respect of a permanently settled estate or of an estate in which the settlement-holder has a permanent, heritable and transferable right of use and occupancy, the Deputy Commissioner may sell the estate at an auction. On behalf of the plaintiff respondent, it has been argued that what is sold is the estate and that the purchaser is entitled to take that estate as against the defaulting proprietors. This contention is clearly well founded. What, then, is the position of the defendants ? They have failed to establish that the disputed lands are comprised within their property. They have, however, proved possession for more than 12 years before the date of the revenue sale. Consequently, at the time when the revenue sale took place, they had by adverse possession acquired a good title to the disputed land as against the proprietors of the estate in which it was included. No doubt, they professed to hold these lands as part of their estate ; but that could not affect the position of the Government nor effect a division of the estate for revenue purposes. Consequently, on the 14th February, 1890, when the sale was held by the Deputy Commissioner, the estate was the property of the original proprietors as also of the defendants who had acquired a good title to a portion thereof by adverse possession. In these circumstances, it is clear from the terms of section 63 of the Assam Land and Revenue Regulation, 1886, that the defendants were defaulters ; and once it is held

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that they were at the time defaulters, the inference is irresistible that they cannot assert a good title as against the purchaser.

The result is that the declaration of title and the decree for possession made in favour of the plaintiff by the District Judge must be maintained. But it is plain that the title to this property has been in great uncertainty as is amply indicated by the varying fortunes of the parties in different stages of this protracted litigation. This is pre-eminently a case where no costs should be allowed to the successful litigant, nor mesne profits decreed. While therefore we maintain the decree of the Court of appeal below as regards declaration of title and possession, we vary it in two respects; we direct that each party pay his own costs throughout the litigation and we disallow all claim for mesne profits up to this date.

A. T. M.

Decree modified.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Walmsley.*

JITENDRA KUMAR PAL CHOWDHURY

v.

MOHENDRA CHANDRA SARMA AND OTHERS.*

CIVIL.

1914.

July, 13, 14, 16.

Limitation—Sale for arrears—Assam Land and Revenue Regulation (I of 1886), sections 70, 80, 85—Person in adverse possession for less than statutory period, if a defaulter—Symbolical delivery of possession to purchaser, effect of, against such person—Sale certificate, if conclusive—Confirmation of sale, date of—Sale, when final—Limitation Act (IX of 1908) Sch. I. Art. 144.

A person who had no interest in an estate was in adverse possession of lands really included in the estate which was sold under section 70 of the Assam Land and Revenue Regulation; he claimed those lands as situated within a neighbouring estate owned by him; his adverse possession had not at the time of sale continued for the statutory period so as to ripen into ownership:

Held, that he was not a defaulting proprietor at the date of the sale and as he was a stranger to the proceedings for delivery of possession, the symbolical delivery could not avail against him.

What is stated in the sale certificate as the date of confirmation of sale cannot operate in law as the date when the sale became final under section 80 of the Assam Land and Revenue Regulation.

* Appeal from Original Decree No. 299 of 1910, against the decree of Babu Kamala Nath Das, Subordinate Judge of Sylhet, dated the 21st March, 1910.

Appeal by Defendant No. 1.

Suit for declaration of title to land and for recovery of possession thereof.

The material facts and arguments are stated in the judgment.

Babus Tarakishore Chowdhury and Brojo Lal Chakrabarty for the Appellants.

Babus Sarat Chandra Roy Chowdhury and Gopal Chandra Das for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the first defendant in a suit for declaration of title to land and for recovery of possession thereof. The plaintiffs respondents claim title to the disputed property by purchase of a share of an estate at a sale for arrears of revenue held on the 25th October, 1887, under section 70 of Regulation I of 1886. On the 17th November 1888, the Subdivisional Officer issued to the purchasers a sale certificate in which it was stated that the sale had been held on the 25th October 1887 in accordance with the provisions of the Assam Land and Revenue Regulation and had been confirmed on the 31st October, 1888. The present suit was commenced on the 26th October 1900. On behalf of the defendants, it was contended in the court below that the suit was barred by limitation. This contention has been overruled by the Subordinate Judge. In this court, in answer to the contention of the defendant appellant that the suit is barred by limitation, the plaintiffs respondents have argued that Art. 144 of the second schedule to the Indian Limitation Act governs the matter. We shall assume that the rule of limitation applicable is contained in Article 144, which provides that a suit for possession of immovable property, not otherwise provided for in the Limitation Act must be brought within 12 years from the date when the possession of the defendant became adverse to the plaintiff. The question in controversy is, when did the possession of the defendants become adverse to the plaintiffs in the case before us. On behalf of the plaintiffs it was argued in the court below that as the sale-certificate recited that the sale was confirmed on the 21st October 1888, the possession of the defendants became adverse to the plaintiffs from that date. This position was contested by the defendants, who raised a question as to the date when the sale became final under the provisions of the Regulation. The Subordinate Judge held that under section 85 the certificate was conclusive evidence as to the date of confirmation of sale. In our opinion this view is clearly erroneous, for sub-section (3) of section 85 lays down that the certificate granted to the

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purchaser is conclusive evidence of regularity of the proceedings, and does not provide that the certificate is conclusive evidence of the date of confirmation of sale. It is worthy of note that the expression 'confirmation of sale' does not find a place either in section 80 or Sec. 85 of the Regulation. Sub-sec. (1) of Sec. 80 provides that a sale, on which the purchase-money has been paid and against which no application under Sec. 79 to set it aside has been preferred, shall, subject to the provisions of sections 81 and 82, be final at noon of the sixtieth day from the date of sale, reckoning the date of sale as the first of the sixty days. Sub-sec. (2), which deals with the case where an application has been preferred to set aside the sale, lays down that a sale against which such an application has been preferred and has been dismissed by the Chief Commissioner or Commissioner, shall, subject to the provisions of Secs. 81 and 82, be final from the date of dismissal, if more than sixty days from the day of sale, or, if less, then at noon of the sixteenth day as provided in sub-sec. (1). In the present case, an application was made to set aside the sale. The question is, when was that application dismissed by the Chief Commissioner? We have on the record a letter from the Secretary to the Chief Commissioner to the Deputy Commissioner in which it is stated that the Chief Commissioner directs the confirmation of the sale held on the 25th October, 1887. This letter bears date the 18th September, 1888. It is thus plain that the application to set aside the sale must have been dismissed by the Chief Commissioner on or before the 18th September, 1888. Consequently, under sub-sec. (2) of Sec. 80, the sale became final on or before the 18th September, 1888, and under sub-sec. 2 of Sec. 85 the title to the property sold vested in the purchaser from such date. How the entry in the sale certificate came to be made, is fairly clear from the record. It appears that the letter from the Secretary to the Chief Commissioner to the Deputy Commissioner was communicated to the Sub-divisional officer by whom the sale had been held; the latter officer, on the 30th October, 1888, recorded an order of confirmation of sale and subsequently issued the sale certificate which bore date the 7th November, 1888. What is stated in the sale certificate as the date of confirmation of sale cannot, however, operate in law as the date when the sale became final under Sec. 80. But it has been strenuously argued for the respondents that the Court is not competent to look beyond the sale certificate, and, is bound to presume therefrom that under sub-sec. (2) of Sec. 85, title vested in the purchaser from the date

of the certificate, that is, from the 7th November 1888. This contention is obviously fallacious. Under sub-sec. 2 of Sec. 85, the date of the certificate is the date when the sale became final, and under sub-sec. (2) of Sec. 80 the date when the sale became final is the date of dismissal of the application to set aside the sale by the Chief Commissioner. An entry in the certificate, by the officer who drew up and issued the document, that the sale was confirmed on the 30th October 1888, could not possibly affect the provisions of sub-sec. (2) of Sec. 80 and sub-sec. (3) of Sec. 85. We hold accordingly that in this case the sale became final on or before the 18th September, 1888. From that date, the title vested in the plaintiffs as purchasers at the revenue sale, and the possession of the defendants became adverse to the plaintiffs *prima facie* from such date. Consequently, under Art. 144 the suit is barred by limitation.

It has been argued as a last resort that as possession was delivered to the purchasers by the revenue authorities on the 29th November 1888, the possession of the defendants must be taken to have become adverse to the plaintiffs only from such date; and, in support of this contention, reliance has been placed upon the decision in *Mozuffer Wahid v. Abdus Samad* (1). That case, even if it be assumed to have been correctly decided, is clearly distinguishable and has no application to the circumstances of this case. In that case, this Court applied to a revenue sale of an entire estate the principle laid down by the Full Bench in *Juggobundhu Mukherjee v. Ram Chunder Bysack* (2) in relation to delivery of possession as between a decree-holder and a judgment-debtor. It was ruled by the Full Bench that in such a case, in contemplation of law, both the parties, that is, the decree-holder and the judgment-debtor, must be considered as present at the time when the delivery is made and that, consequently, as against the judgment-debtor, the symbolical delivery thus given must be deemed equivalent to actual possession. The Full Bench, however, proceeded to observe that as against third parties, that is, persons not parties to the decree, this symbolical possession as it is called would be of no avail, because they are not parties to the proceeding. A similar principle has been applied by a subsequent Full Bench in the case of *Juggobundhu Mitter v. Purnanund Gossami* (3) as between an execution-purchaser and the judgment-debtor. Even if we assume,

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(1) (1880) 6 C. L. R. 539.

(2) (1880) I. L. R. 5 Calc. 584, F. B.

(3) (1889) I. L. R. 16 Calc. 530 F. B.

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therefore, as was done in the case of *Mozuffer Wahid v. Abdus Samad* (1), that this principle is applicable as between a purchaser at a revenue sale and the defaulting proprietor, the doctrine would have no application to persons other than the defaulting proprietor, as was pointed out in the case of *Mir Waziruddin v. Lala Deoki Nandan* (2). Now, in the case before us, the appellant was not a defaulting proprietor. The case for the plaintiffs is that the appellant had no interest in the property sold; he was a trespasser and was, at the time of the revenue sale, in adverse possession of lands which are really included in the estate sold but which he claimed as situated within a neighbouring estate owned by him. His adverse possession, according to the plaintiffs, had not at the time continued for the statutory period so as to ripen into ownership. The principle recognized in *Rahimuddin Munshi v. Nalini Kant Lahiri* (3), had consequently no application and he could not be deemed a defaulting proprietor at the date of the sale. He was thus a stranger to the proceeding for delivery of possession, and the symbolical delivery alleged to have been effected on the 25th November 1888 could not avail as against him. We hold accordingly that the suit is barred by limitation; and in this view it is needless to discuss the interesting questions as to the true effect of sections 70 and 72 of Regulation I of 1886 which have been ably argued before us by counsel on both sides.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside in so far as it is not a decree by consent of parties, and the suit dismissed with costs. This order will not affect the decree of the Subordinate Judge in so far as it was a decree by consent of parties. We assess the hearing-fee in this Court at fifteen gold mohurs.

A. T. M.

Appeal allowed.

(1) (1880) 6 C. L. R. 539.

(2) (1907) 6 C. L. J. 472 (482).

(3) (1909) 13 C. W. N. 407.

PRIVY COUNCIL.

PRESENT :—*Lord Shaw, Sir John Edge and Sir Lawrence Jenkins.*

JATINDRA NATH BASU AND OTHERS

v.

SRIMATI PEYER DEYE DEBI AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
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*March, 15, 16, 17,
20, 28.**Specific performance, suit for—Explanation of 'specific performance'—Vendor and purchaser—Contract to sell and purchase a decree—Transfer—Assignment—Duty to keep decree alive until assignment—Code of Civil Procedure (Act XIV of 1882), Sec. 232.*

The expression 'specific performance', as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other, in which by the preliminary agreement they were intended to be put.

Wolverhampton and Walsall Railway Company v. London and North-Western Railway Company (1) relied upon.

The Court will not decree a suit for specific performance of an agreement if it finds that at the date of suit the plaintiff cannot complete the agreement by doing what remained to be done by him under it.

Where a decree-holder agrees to sell his decree, a transfer thereof to the purchaser could, by reason of section 232 of the Code of Civil Procedure, 1882, be effected only by an assignment in writing, and until such an assignment it is the duty of the decree-holder (the vendor) to keep the decree alive; and if owing to the bar of limitation the decree becomes incapable of execution, the vendor cannot maintain a suit for specific performance of the agreement against the purchaser inasmuch as the decree, which the purchaser has agreed to purchase and which the vendor has agreed to assign to him, is a decree incapable of execution.

Appeal from a judgment and decree of the High Court (Maclean C. J., Harington and Fletcher JJ.) at Calcutta in its appellate civil jurisdiction (March 1, 1909) reversing those of the said Court (Chitty, J.) in its ordinary original civil jurisdiction (April 6, 1908).

The suit was brought on the 20th June 1898 by the plaintiffs respondents against the defendants-appellants for a decree for specific performance of a contract, dated the 20th June 1895, whereby the respondents or their representatives agreed to sell a mortgage decree, dated the 17th July 1893, to the appellant's representative Trailokya Nath Bose who agreed to buy it for Rs. 10,000. The

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said decree was made in a suit by the respondents as puisne mortgagees of certain properties in the districts of Durbhanga and Monghyr. At the time of the agreement the Monghyr properties comprised in the said decree had been sold for arrears of Government revenue, but it was agreed that the surplus sale proceeds, which were then on deposit in the Collectorate at Monghyr should be paid to the said Trailokya Nath Bose. It appeared that the first mortgagee of the said properties, who was a party to the said suit of the puisne mortgagees, had obtained a decree on their mortgage and in execution thereof the Durbhanga properties were sold and purchased by the said Trilokya Nath Bose on the 21st June 1895. On an application by the respondents, dated the 8th June 1898, for execution of their decree of the 17th July 1893 it was held by the High Court that it became time barred on the 1st June 1898: See *Troyloky Nath Bose v. Jyoti Prakash Nandi* (1). The appellants contended that the decree agreed to be sold being barred by limitation, they were under no obligation to carry out the agreement. Mr. Justice Chitty, who tried the suit, held that it was the duty of the vendors to keep the decree alive and dismissed the suit on the ground that at the date of suit the decree was barred by limitation. His judgment on the point was as follows:—

“A long discussion took place as to what class of property this mortgage decree belonged. It was admitted that it was not immovable property; and for that there is direct authority: see *Gous Mahomed v. Khawas Ali Khan*, (2); and *Baij Nath Lohea v. Binoyendra Nath Palit* (3). The cases therefore cited by the defendants’ counsel as to the trusteeship of a vendor for his purchaser do not apply. If it be not immovable property it follows that it must be moveable property [see General Clauses Act 1868, section 2, (5) and (6) and General Clauses Act 1897, section 3, (25) and (34)].

“Plaintiffs’ counsel argued that it must in that case necessarily fall within the definition of “goods” in section 76 of the Indian Contract Act and be governed by the provisions of Chapter 7 of that Act. No doubt the words of the section are general and appear to support such a contention, but it is obvious that the provisions of the Chapter cannot be applied without reserve to all kinds of moveable property. Moveable property, which I take to be synonymous with “personal property” in England, is divided into two main classes *choses in possession* and *choses in action*. There are numerous kinds of

(1) (1903) I. L. R. 30 Calc. 761.

(2) (1896) I. L. R. 23 Calc. 450.

(3) (1901) 6 C. W. N. 5.

incorporeal personal property to which many of the sections in Chapter 7 could not possibly apply, e.g., the sections as to the passing of the property, delivery and so forth. The distinction has been observed in the Sale of Goods Act, 1893 where "goods" is defined as including "all chattels personal other than things in action and money, and in Scotland all corporeal movables except money." To take the case of a decree, the law recognises only two modes of transfer, by assignment in writing, or by operation of law. This is plainly indicated by section 232 of the Civil Procedure Code. Where (as in this case) it is intended that there should be a registered deed of assignment and that the price should be paid on the execution of such deed, and that deed is absolutely necessary to effect the transfer, how can it be successfully argued that the property in the decree passed immediately on the execution of the agreement to sell? If it did not, what were the obligations of the decree-holders? I am clearly of opinion that they were bound to keep the decree alive, at least if they desired to enforce performance of the agreement. No one else could do so. The intending purchaser would have no *locus standi* to apply to the Court in execution. That was within the decree-holder's sole control. They chose to allow the decree to become time-barred, and I entirely fail to see how they can force a useless and depreciated decree upon the purchaser. It was argued that the decree had not become mere waste paper: that it would form a good cause of action for a suit. It is unnecessary to discuss how far this is true and under what circumstances a suit could be brought upon the decree. It might well be that the assignee would find his suit barred by the provisions of section 244, Civil Procedure Code. "The fact however remains that the character of the decree had been so changed for the worse when the suit was filed, that the purchaser could not be compelled to take it. It was not what he had agreed to buy." On appeal by the respondents the decision of Mr. Justice Chitty was reversed and the suit decreed. The learned Judges (Maclean, C. J., and Harington and Fletcher, JJ.) held that after the execution of the contract in question the vendors became trustees for the purchaser and the decree became in equity the property of the purchaser subject to his obligation to pay the purchase money, and that if the purchaser had asked the vendors to take any steps to keep the decree alive, they would have done so, but that the vendors owed no further duty to the purchaser. The following is the material part of their judgment:—

"The learned Judge gave judgment for the defendants on the

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ground that the decree had become time-barred by limitation. We are unable to agree with this judgment.

"The learned Judge held that upon the agreement for sale the vendors did not become trustees for the purchaser and that the risk of the destruction of the property agreed to be sold was with the vendors until actual payment of the purchase price.

"In our opinion after the execution of the contract the vendors became trustees for the purchaser and the decree in equity became the property of the purchaser subject to his obligation to pay the purchase price. Moreover the learned Judge has ignored the fact that the application to execute the decree was opposed by Trailokya Nath.

"We think it would be lamentable in these circumstances to allow this suit to fail simply by reason of the fact that the decree cannot now be enforced against the Monghyr properties which are of very small value.

"There can be no doubt that the agreement was entered into by the defendant in order to induce the executors to abstain from bidding at the sale of the Durbhanga properties and on the faith of the agreement the executors did abstain from bidding. Certainly since the 8th May 1897 the executors were not in default and it cannot be doubted if Trailokya Nath had asked the executors to take any step to keep the decree on foot they would have done so. They owed no further duty to the purchaser."

The defendants thereupon appealed to His Majesty in Council. *De Gruyther, K. C.*, and *Sir William Garth*, for the Appellants: It has been held in *Troylokya Nath Bose v. Jyoti Prokash Nandi* (1) that the decree in question had become incapable of execution on the 1st June 1898, and the respondents, who brought the suit on the 20th June 1898, are not entitled to specific performance of the agreement to sell the decree, because the decree at the date of suit was a dead decree, and they consequently were not in a position to assign a live decree, which they agreed to sell.

A decree could be transferred only by an assignment in writing and until such an assignment the only persons who could have kept the decree alive were the respondents: Transfer of Property Act, 1882, (Act 4 of 1882), section 130; and the Code of Civil Procedure, 1882, section 232. It was the duty of the respondents to keep the decree alive. Further, from the date of the agreement until assignment they were trustees for the appellants and were under an obligation

(1) (1903) I. L. R. 30 Calc. 761.

to keep the decree alive: *Lysaght v. Edwards* (1); *Wilson v. Clapham* (2); and Lewin's Law of Trusts, 12th, Ed., pp. 161 and 162.

[Lord Shaw referred to section 54 of the Transfer of Property Act, 1882, and observed that the whole law in England on the subject based on *Holmyd v. Marshall* (3) was opposed to the section. It was doubtful whether English authorities would apply. In dealing with movable property, Indian Contract Act must be looked to, and if the property is immovable, Transfer of Property Act would apply.]

If the decree agreed to be sold be held immovable property, section 54 of the Transfer of Property Act would apply, and under the section a contract of sale does not, of itself, create any interest in or charge on the decree. If the decree be held movable property, section 130 of the Act would apply, under which no transfer of the decree in question took place as there was no assignment in writing. In either case the property in the decree remained in the respondents, whose duty it was to keep the decree alive.

Sir Erle Richards, K. C., and *Dunne* for the respondents: The question, whether it was the duty of the appellants or the respondents to keep the decree alive, would depend on the circumstances of the case, the terms of the contract and the conduct of the parties. Under the agreement from the date thereof the purchaser got absolute control of the proceedings on the decree. The vendors could do nothing with regard to it without his consent.

[*Sir John Edge*: The purchaser could not apply for execution.]

There was no duty on the respondents to take any steps to keep the decree alive unless they were requested by the purchaser, who made no such request. Even if the duty were on the respondents, it was only jointly with the purchaser who was a party to the suit in which the decree was made.

In equity the purchaser became the owner of the decree from the date of the agreement, and if it became a dead decree he must bear the loss, as there was no duty on the vendors to keep the decree alive: *Rayner v. Preston* (4). The provision in section 54 of the Transfer of Property Act that a contract for sale does not, of itself, create any interest in or charge on the property agreed to be sold, does not refer to an equitable interest or charge, and consequently the section does not apply. Under section 3 (34) of

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(1) (1876) L. R. 2 Ch. D. 499, (506, 507).

(2) (1819) 1 J. & W. 36.

(3) (1862) 10 H. L. Cases, 191.

(4) (1880) L. R. 14 Ch. D. 297, and on appeal (1881) L. R. 18 Ch. D. 1.

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the General Clauses Act, (Act X of 1897), a decree is movable property and as such falls within the definition of 'goods' in section 76 of the Indian Contract Act, 1872. The rights and duties of the seller and the buyer of the decree must therefore be determined in accordance with the provisions in Chapter 7 of the Act.

The property in the decree passed to the appellants on the date of the contract, and the burden to keep the decree alive was on them from that date: see Indian Contract Act, 1872, section 86, illustration (a), and section 93.

De Gruyther, K. C. replied referring to *Mulraj Khatau v. Vishwanath Parbhuram Vaidya* (1), and the Indian Contract Act, 1872, section 83.

The judgment of their Lordships was delivered by

March, 28.

Sir John Edge :—This is an appeal from the decree, dated the 1st March, 1909, of the High Court at Calcutta, which in appeal set aside the decree, dated the 6th April, 1908, of Mr. Justice Chitty, who had tried the suit under the original jurisdiction of that Court.

The suit was brought to obtain a decree for the specific performance of an agreement, dated the 21st June, 1895, by which the original defendant Trailokya Nath Bhowe, now deceased, had agreed to purchase from the executors and the executrix (hereinafter referred to as the executors) of Lala Bangsa Gopal Nandey for the price of 19,000 rupees a decree and all the rights appertaining thereto which the said executors had obtained on the 17th July, 1893, against Pandit Nrisingha Prokash Misra on a mortgage. Mr. Justice Chitty dismissed the suit. The High Court in appeal made a decree for specific performance.

The appeal has been argued at considerable length, but the material facts upon which the suit and this appeal depend may be briefly stated. The decree which it was agreed that the executors should assign to Trailokya Nath Bhowe was a decree for sale of certain immovable hypothecated properties, which could also in certain events be executed against the person and other property of the defendant to the suit in which it was made. Owing to the bar of limitation the decree for sale became incapable of execution on the 1st June, 1898, and thereupon Trailokya Nath Bhowe refused to pay the agreed price and to take an assignment of the decree, hence this suit for specific performance.

The agreement of which it is sought to obtain specific performance was an executory agreement, for the completion of which something remained to be done in order to put the parties in a position relative to each other in which, by the preliminary agreement of the 21st June, 1895, they were intended to be placed. As was pointed out by Lord Selborne, L.C., in *Wolverhampton and Walsall Railway Company v. London and North-Western Railway Company* (1), "the expression 'specific performance,' as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other, in which by the preliminary agreement they were intended to be placed." In this case what remained to be done was, on payment by Trailokya Nath Bhowse of the agreed price, the transference to him of the decree for sale of the 17th July, 1893. Such a transfer of the decree to Trailokya Nath Bhowse could, by reason of section 232 of the Code of Civil Procedure, 1882, be effected only by an assignment in writing. On and after the 1st June, 1898, the decree, as a decree capable of being executed, could not by reason of the bar of limitation be assigned to Trailokya Nath Bhowse. It had become a dead decree: whereas the decree, whatever might be its value, which he had agreed to purchase, and which the executors had agreed to assign to him, was a decree capable of execution.

It has been contended on behalf of the respondents to this appeal that it was the duty of Trailokya Nath Bhowse, and was not the duty of the executors, to keep the decree alive after the 21st June, 1895. That is a contention which, in their Lordships' opinion, cannot be maintained. As the decree had not been transferred by an assignment in writing to Trailokya Nath Bhowse, he could not by any application to the Court have kept the decree alive.

The respondents are asking for a decree for the specific performance of an agreement which they, on their part, are unable to perform. Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court in appeal should be set aside with costs, and the decree of Mr. Justice Chitty should be restored.

The plaintiff-respondents must pay the costs of this appeal.

G. F. Farr :—Solicitor for the Appellants.

Watkins and Hunter :—Solicitors for the Respondents.

J. M. P.

Appeal allowed.

(1) (1873) L. R. 16 Eq. 433.

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March, 13 & 21.

JAMNA BAI SAHEB MOHITAI AVERGAL

v.

VASANTA RAO ANANDA RAO DHYBAR.

(ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.)

Code of Civil Procedure (Act XIV of 1882), S. 462—Compromise of a suit wherein both plaintiff and defendant were minors—Sanction on behalf of minor plaintiff—Compromise not binding on minor defendant—Leave of the Court—Joint contract, liability of a promisor.

Where both the plaintiff and the defendant to a suit were minors and the suit having been compromised, the Court sanctioned the compromise on the application of the plaintiff's next friend :

Held, that the requirements of section 462 of the Code of Civil Procedure, 1882, had not been observed in protection of the minor defendant, and consequently the plaintiff could not enforce the compromise against him.

One of two joint promisors could not plead the minority and consequent immunity of the other as a bar to the promisee's claim against him.

Sethuram Sahib v. Vasanta Rao Ananda Rao Dhybar (1) affirmed.

Two consolidated appeals from a decree of the High Court at Madras (July 29th 1910) confirming so far as Jamna Bai (appellant in the first of the two appeals) and reversing in the case of Sethuram (respondent in the second appeal) a decree of the Court of the Subordinate Judge of Tanjore (January 10, 1906).

The suit giving rise to these two appeals was brought by Vasanta Rao against Sethuram (defendant 1) and Jamna Bai (defendant 2) on a debt bond, dated the 16th June 1897, which was executed on behalf of the first defendant, who was a minor at the time, by his grandmother who was guardian of his property, and the second defendant. The material part of the bond was as follows :—

"We, the executants aforesaid, hereby agree and bind ourselves to conjointly pay to you Vasant Rao Anand Rao Dhybar at Tanjore Rs. 90,000 in consideration of your withdrawing the aforesaid suit No. 2 of 1896 now pending in the District Court of Tanjore, in which you claim to be heir and legal representative of the deceased Raja Sakharam Saheb of Tanjore, and in consideration of your giving up all rights in the estate and properties of the said Sakharam Saheb.

"We further agree to pay the said amount within three months from the date of our taking delivery of the movable and immovable

properties of the said Raja Sakharam Saheb as scheduled in the aforesaid suit now under the management and custody of the Receiver, appointed by the District Court, Tanjore, in the aforesaid suit."

"If we fail to pay the amount within the time specified above, we further agree to pay the same with interest at 6 per cent. per annum from the date of default to the date of realization."

The following were the circumstances under which the bond was executed: The first defendant was the brother of the second defendant, and the latter was the widow of one Sambu Singh, who was the adopted son of the late Sakharam Saheb, the son-in-law of the last Mahratta ruling prince of Tanjore. Sambu died during the life-time of Sakharam, who died in 1895. On the death of Sakharam the Collector of Tanjore took possession of some of the movable property as stake-holder for the person entitled. Three claimants to Sakharam's estate brought suits to enforce their respective claims. The first of such suits (Suit No. 5 of 1895) was instituted by the present defendants to establish an alleged will of Sakharam under which they claimed to benefit. The second suit (Suit No. 36 of 1896) was brought by one Chota Raja who claimed to be the adopted son of Sakharam's deceased adopted son Sambu. Chota Raja disputed the validity of the said will and claimed the entire estate of Sakharam as his sole heir. Both those suits were compromised between Chota Raja on the one hand and the present defendants on the other upon among others the terms that the said will should be established, that certain properties consisting of seven villages which had been settled upon Jamna Bai for life should become her absolute property, and that the remainder of the estate should in effect be divided in equal shares between Sethuram and Chota Raja. These two claimants also agreed to bear in equal shares all the costs incurred in resisting any claims that might be put forward by third parties adversely to both of them, and to meet in equal shares any such claims if decreed against them. Decrees were accordingly passed in both the said suits. The third suit (Suit No. 2 of 1896) was brought by the present plaintiff against the present defendants, Chota Raja and others. In that suit Vasanta Rao disputed both the said will and adoption, impugned the said compromise as fraudulent, and claimed the entire estate for himself as the nearest *bandhu* of Sakharam. The schedules annexed to the plaint enumerated most of the properties of the deceased other than those in the possession of the Collector, and the properties scheduled were placed in the possession of a Receiver appointed

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by the Court. Subsequently it was proposed that to induce the withdrawal of Suit No. 2 of 1896 there should be paid to Vasanta Rao Rs. 90,000 by Sethuram and Jamna Bai, Sethuram receiving a moiety of this sum from Chota Raja. The three claimants Sethuram, Chota Raja and Vasanta Rao were minors and were respectively represented by their guardians or next friends. Two bonds were executed. One of them was the bond in suit. It was for Rs. 90,000 and was executed in favour of the plaintiff, represented by his mother and next friend, by the defendants. The other for Rs. 45,000 was executed by Chota Raja in favour of Sethuram. Thereafter the plaintiff's mother filed a petition to withdraw the suit. But on the petition coming on the Court wanted to know whether the plaintiff's mother who was *gosha* was aware of the step taken, and having examined her on commission and satisfied itself on the matter, allowed the suit to be withdrawn on the 17th September 1897, and ordered the receiver to restore all the properties in his possession to the defendants with the exception of the properties taken from the Collector's custody.

On the 6th April 1904 the suit giving rise to these appeals was brought on behalf of Vasanta Rao against Sethuram, who was sued by his guardian who had executed the said bond on his behalf, and Jamna Bai to enforce the said bond for Rs. 90,000 and claiming interest thereon from the 18th September 1897, three months before which date it was charged that the second defendant had received possession of the properties referred to in the said bond.

The defendants filed separate written statements contending that the suit was premature inasmuch as the bond contemplated delivery of possession of all the properties left by Sakharam to Sethuram and Chota Raja but the properties, of which the Collector had taken possession and which had been handed over by him to the Receiver in Suit No. 2 of 1896, had not been delivered to the said persons at the date of the suit. It was also pleaded that the bond sued on was void for want of the sanction of the Court under section 462 of the Code of Civil Procedure, 1882.

The Subordinate Judge decreed the suit. He was of opinion that payment was due under the bond three months after possession was received by the defendants of the properties specified in the schedules to the plaint in Suit No. 2 of 1896 and was not dependent upon the receipt by them of the movables in the custody of the Collector. He found that the sanction of the Court was not obtained for the execution of the bond as part of the compromise of Suit No. 2 of 1896, but held that it was binding on the first defendant

inasmuch as he did not offer to restore the properties which he had obtained under the compromise and it was impossible to place the plaintiff in the same position as he was in at the date thereof, and that the bond in suit was binding on the second defendant.

On appeal by the defendants the High Court agreed with the Court below that the suit was not premature and that sanction of the Court was not obtained on behalf of the first defendant to the said compromise, but it held that the bond in question was unenforceable against the first defendant for want of such sanction and that the fact that it was unenforceable against the first defendant did not render it unenforceable also against the second defendant. The suit was accordingly dismissed as against the first defendant and the decree appealed from was confirmed as against the second defendant. For a report of the judgment of the High Court see *Sethuram Sahib v. Vasanta Rao* (1).

Thereupon, the plaintiff and the second defendant separately appealed to His Majesty in Council, and both these appeals were consolidated.

De Gruyther,¹ K. C., and *F. B. Raikes*, for the second defendant Jamna Bai: The liability under the bond does not arise until three months after the delivery of the properties "as scheduled in the suit," which means all the properties referred to in the plaint, and not only those mentioned in the schedules attached to the plaint; and as the properties, which were taken over by the Collector but formed the subject matter of the suit, were not delivered till after the suit, it is submitted that the suit is premature.

Both Courts have found that the Court did not sanction the compromise on behalf of the first defendant, and therefore the compromise is not binding on him: *Ganesha Row v. Tuljaram Row* (2) *Monohar Lal v. Jadu Nath Singh* (3); and *Subramanian Chettiar v. Rajah Rajeswara Dorai* (4). The bond being a part of the compromise is not binding on him, and the plaintiff would be restored to his original position, that is to say, he will be able to revive his suit No. 2 of 1896 against the first defendant. But the obligation under the bond would only arise if the plaintiff gave up all his rights to the estate of the late Sakharam. The result of the decree of the High Court is that the plaintiff would have the right to go on with his old suit and also have Rs. 90,000. But the clause of the bond under which the liability arises is incapable of division and the plaintiff is not entitled to any decree against Jamna

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(1) (1910) I. L. R. 34 Mad. 314.

(3) (1906) I. L. R. 33. I. A. 128.

(2) (1913) L. R. 40 I. A. 132.

(4) (1915) 23 C. L. J. 337 P. C.

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Bai. Moreover, it is a joint contract and if it is not binding on the first defendant, it is not binding on the second defendant also : *King v. Hoare* (1) ; *Kendall v. Hamilton* (2) ; *Underhill v. Horwood* (3) ; and *Ellesmere Brewery Company v. Cooper* (4).

Sir Erle Richards, K. C. and *Kenworthy Brown*, for the plaintiff Vasanta Rao, were asked to confine the argument only to the appeal against the first defendant : The present case is distinguishable from the cases relied on under section 462 of the Code of Civil Procedure, 1882. In those cases there was no evidence to show that the attention of the Court was drawn to the fact that one of the parties was a minor. But here the Judge had all the facts before him. He had his attention drawn to the terms of the compromise. The parties were described as minors and were represented by Counsel before the Court, which sanctioned the compromise after inquiry.

[*Sir John Edge* : The application for sanction was on the part of the minor plaintiff, and not on behalf of the minor defendant].

The Court was in possession of all the facts. Assuming that the bond is not binding on the first defendant, the plaintiff is entitled to be restored to his original position. But the High Court has given him no relief, and it is submitted that he is entitled to some relief as against the first defendant.

Sir William Garth, for the first defendant Sethuram, was not called upon.

The judgment of their Lordships was delivered by

March 21.

Sir Lawrence Jenkins.—These appeals arise out of a suit on a money bond of the 16th June, 1897, expressed to be executed to the present plaintiff, Vasanta Rao, by the defendant, Sethuram Saheb, "represented by his grandmother and guardian," and by the defendant Jamna Bai.

Sethuram was then a minor and this was apparent on the face of the bond. The substantial question, therefore, now in dispute is whether Sethuram is under a personal obligation to pay the plaintiff the amount he claims, and if not, whether this furnishes Jamna Bai with an answer to the suit. The plea that the suit is premature has no real value. It does not touch the merits, and both Courts agree that the objection is not well-founded. This view is in accord with the meaning placed by the defendants themselves in their written statements on the phrase in the bond which is decisive of this point, and their Lordships see no reason to doubt its accuracy. This plea

(1) (1844) 13 M. & W. 494.

(2) (1879) L. R. 4 A. C. 504.

(3) (1804) 10 Ves. Jun. 209.

(4) (1896) L. R. 1 Q. B. 75.

therefore fails. On the more important question the two Courts are not in complete agreement. The Subordinate Judge passed a decree against both defendants. The High Court on appeal upheld the decree against Jamna Bai, but dismissed the suit against Sethuram. This has led to the two present appeals. Though the circumstances connected with the passing of the bond are intricate, the real issues involved in the suit are simple. To establish Sethuram's liability the plaintiff relies on section 462 of the Code of 1882. But even if compliance with the terms of this section would have established the claim against Sethuram—a point on which no opinion is now expressed—this in no way helps the plaintiff, for the requirements of the section have not been observed in protection of Sethuram. The High Court, therefore, rightly held him not liable to the plaintiff under the bond. But this furnishes Jamna Bai with no answer to the plaintiff's claim against her. Stripped of all that is not relevant, the plea advanced on her behalf is that one of two promisors can plead the minority and consequent immunity of the other as a bar to the promisee's claim against him. This is a position that cannot be maintained, and the plea has been properly rejected by the High Court. On possible developments in the future it would be wrong for their Lordships to make any pronouncement; they will therefore humbly advise His Majesty that each of these appeals should be dismissed. There will be no order as to costs.

Chapman-Walker and Shephard :—Solicitors for the plaintiff.

Douglas Grant :—Attorney for the defendants.

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Appeals dismissed.

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APPELLATE CIVIL.

Before Mr. Justice D. Chatterjee and Mr. Justice Newbould.

ASWINI KUMAR AICH

v.

SARODA CHARAN BASU AND OTHERS.*

Withdrawal of suit without leave; effect of—Civil Procedure Code (Act V of 1908), Order XXIII, rule 1, sub-rule (3)—Bengal Tenancy Act (VIII of 1885), Secs. 106, 109.

* Appeal from Appellate Decree No. 685 of 1915 against the decision of Babu Romesh Chandra Sen, Subordinate Judge of Bakerganj, dated the 23rd December, 1914, reversing that of Babu Surja Kanta Sen, Munsiff of Perojpur, dated the 23rd July 1913.

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In the absence of permission to bring a fresh suit, O. 23, r. 1, sub-rule (3) of the Civil Procedure Code, precludes the plaintiff from instituting any fresh suit in respect of such subject matter or such part of the claim from which he has withdrawn.

Suits for declaration of title and for recovery of possession are entirely foreign to the jurisdiction of the Revenue officer under Sec. 106, of the Bengal Tenancy Act, his work being limited to entries in the record of rights.

Section 109 of the Bengal Tenancy Act is a bar only in respect of matters which are legally the subject matter of the investigation made under Chapter X of the Act and of decisions thereunder.

Appeal by the Plaintiff.

Suit for declaration of title and for recovery of possession.

The plaintiff brought a suit in a revenue Court under section 106 of the Bengal Tenancy Act that the entry in a record of rights was not correct. Before the delivery of judgment in the suit but after the hearing, the plaintiff made an application to withdraw with liberty to bring a fresh suit on the same cause of action. The order on that application was, "The plaintiff is allowed to withdraw." No order to bring a fresh suit was obtained by the plaintiff. The present suit was thereafter brought by the plaintiffs for declaration of title and for recovery of possession of the lands wrongly recorded in the record of rights. The Court of first instance gave a decree in favour of the plaintiff. On appeal the lower appellate Court reversed the judgment on the ground that the suit is barred under O. 23, rule 1, sub-rule (3) of Civil Procedure Code. Hence the present appeal.

Dr. Sarat Chandra Bysack (with him *Babu Nilkanta Ghosh*) for the appellant: The present suit is not barred as the subject-matters of the two suits are entirely different. The former suit was brought simply for the correction of an entry in the Record of Rights but the present suit is for recovery of possession after declaration of title. A revenue Court cannot give a decree for possession: *Kali Sundari Debya v. Giriju Sankar Sanyal* (1); *Nilmani Kumar v. Kedar Nath Ghose* (2); *Pran Krishna Saha v. Trailokhya Nath Chaudhuri* (3). Section 109 of Bengal Tenancy Act should be construed very strictly. "Any matter" must be taken to be "correction of entry" and not "declaration of title and possession" which however cannot properly come within the purview of section 106. Referred to *Cheodditti v. Tulsi Singh* (4).

Babu Asitaraman Ghosh for the Respondents: No permission was

(1) (1911) 15 C. W. N. 974.

(3) (1915) 19 C. W. N. 911.

(2) (1913) 17 C. W. N. 750.

(4) (1912) I. L. R. 40 Cal. 428.

given to the appellant to bring a fresh suit on the same cause of action. The subject matter of the suit under section 106 and that of the present suit are the same. For, in order to correct an entry under section 106, the Revenue Officer must go into the questions of possession and title, otherwise how would he settle "any dispute" with regard to an entry? The suit is therefore barred under O. 23, rule 1, sub-rule (3) of the Civil Procedure Code. The suit is at any rate barred under section 109 of Bengal Tenancy Act. If the present suit is not barred, the result would be multiplicity of suits—an effect studiously avoided by the legislature.

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The judgment of the Court was delivered by

D. Chatterjee, J.—In a record of rights under chapter X of the Bengal Tenancy Act, the plaintiff was recorded as the owner of $\frac{2}{3}$ rd of a *howla* and the defendant of the remaining $\frac{1}{3}$. The plaintiff brought a suit under section 106 of the Bengal Tenancy Act for a decision that the entry was not correct. That case was heard and remained pending for delivery of judgment. In this state of things, the plaintiff made an application to withdraw from the suit with liberty to bring a fresh suit on the same cause of action. The order on the application was : "The plaintiff is allowed to withdraw." No order was made that he was permitted to bring a fresh suit on the same cause of action.

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The plaintiff then brought this suit in the civil Court and his prayers are, *first*, that his title to the $\frac{1}{3}$ of the *howla* recorded in the name of the defendant be established ; *secondly*, that his title by adverse possession to the same be established ; *thirdly*, for recovery of possession of the same if necessary ; and *fourthly*, for any other relief that he may be entitled to.

Among other issues, issue No. 3 framed by the learned Munsiff was—"Is chapter X of the Bengal Tenancy Act a bar to the maintainability of the present suit?" At the hearing, this issue was not pressed. In his judgment, he says : "Issue No. 3 was not pressed at the bar" and he decreed the plaintiff's suit.

The defendant appealed and in his grounds of appeal he did not even mention that any provision of chapter X of the Bengal Tenancy Act was a bar to the suit. The learned Judge, however, at the hearing took up the issue in bar under chapter X and held that the suit was barred under order XXIII, rule 1, sub-rule (3) of the Civil Procedure Code, because the plaintiff had not obtained the permission of the Court to bring a fresh suit on the same cause of action.

We are clearly of opinion that the learned Judge is wrong in his

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conception of the law on this point. Order XXIII, rule 1, sub-rule (3), in the absence of permission to bring a fresh suit, precludes the plaintiff from instituting any fresh suit in respect of such subject-matter or such part of the claim from which he has withdrawn. Now, the subject-matter of the petition under section 106 was the correction of the record of rights; the subject-matter of the suit in the civil Court, however, is not the same. The plaintiff does not even make any prayer of this kind. The prayer is for declaration of title and for recovery of possession. These matters are entirely foreign to the jurisdiction of the Revenue Officer under section 106, his work being confined to a decision of the point whether the entry in the record-of-rights is correct or not. Supposing he holds that the entry is correct, that does not preclude the plaintiffs from bringing a suit in the civil Court to have his title declared and possession restored. The bar under section 109 of the Bengal Tenancy Act is a bar only in respect of matters which are legally the subject-matter of the investigation made under the Chapter and of decisions thereunder.

In this case, the subject-matters of the two proceedings, that is, of the proceedings under section 106 and of this suit, are entirely different and whether the suit under section 106 was disposed of in one way or another, the present suit is not barred.

In this view of the case, we set aside the judgment and decree of the lower appellate Court and send back the case for decision on the merits.

Costs will abide the result.

The appellant will be entitled to a refund of the Court-fee on the memorandum of appeal to this Court.

R. M.

Appeal allowed : Case remanded.

Before Mr. Justice Walmsley and Mr. Justice Newbould.

SIDHESWAR PANDA AND OTHERS

v.

PITBAS GAONTIA AND OTHERS.*

*Lambardar Gaontia, settlement by—Raiyati land, lease of—Lease, if valid—
Central Provinces Land Revenue Act (XVIII of 1881) Sec. 138.*

A lambardar Gaontia can grant a lease of raiyati land without the approval of co-sharer Gaontias.

Appeal by the Plaintiffs.

Suit by the plaintiffs for recovery of Khas possession of the lands in dispute to the extent of their interest.

The material facts will appear sufficiently from the judgment of Walmsley J.

Babu Satis Chandra Ghose for the Appellants.

Babu Sarat Kumar Mitra for the Respondents.

C. A. V.

The following judgments were delivered :—

Walmsley, J.—The plaintiffs prefer this appeal. They are co-sharer Gaontias in a village in the district of Sambalpur to the extent of twelve annas. Defendant No. 1 is another co-sharer Gaontia, with an interest of two annas, and he is also the Lambardar Gaontia. Defendants 2, 3 and 4 are co-sharers to the extent of the remaining two annas.

The case for the plaintiffs is that the Lambardar took proceedings in the Court of the Deputy Commissioner for the ejectment of two tenants from their lands, obtained an order for their ejectment and took possession of their land on July 21st 1909; and then without their approval granted a lease of the land to defendant No. 5, Dibakar. The plaintiffs say that the Lambardar had no authority to grant such a lease, and that they served a notice on him warning him not to grant a lease, and they claim to be put in khas possession of the land to the extent of their interest.

The first Court decreed the plaintiff's suit, but this decision was reversed by the learned Subordinate Judge on appeal.

* Appeal from Appellate Decree, No. 1175 of 1913, against the decision of Babu Probha Chandra Sinha, Subordinate Judge of Sambalpur, dated the 4th February, 1913, reversing that of Babu Amrita Nath Mitra, Munsiff of Sambalpur, dated the 19th August, 1912.

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The suit as originally framed related to the land of a third tenant also, but in the lower appellate Court that part of the claim was withdrawn. So we are concerned now only with the land from which two tenants were ejected under the orders of the Deputy Commissioner.

The lower appellate Court has reversed the Munsiff's finding about the notice said to have been sent by the plaintiffs to the Lambardar, and consequently we need not consider whether such a notice would affect the Lambardar's powers.

The learned Subordinate Judge has found that the Lambardar did grant a permanent lease of the land to defendant 5, and settled that defendant on the land after ejecting other tenants, and that in settling the defendant on the land he acted within the scope of his authority. We are asked to hold that this decision is wrong, and that the Lambardar could neither settle a tenant on the land still less grant him a permanent lease without the consent of the co-sharers, and that the plaintiffs are entitled to khas possession. For information about the status of Gaontias and the Lambardar Gaontia we have consulted Mr. Russell's Report on the settlement of the Sambalpur District, published in 1883. That contains a full account of the whole matter. It appears that the first point to be decided is the nature of the land, that is to say whether it was included in the Gaontia's *bhagira*-land or was part of the land let to tenants on a rent assessed by the Settlement Department. It was cultivated land, so it must fall within one of those two classes. The Munsiff does not refer to this point at all, but before the learned Subordinate Judge it is clear that 'the land was treated as raiyati land, that is assessed land held by raiyats, for the Judge more than once refers to it as raiyati land, and no objection is taken to this description in the grounds of appeal.

Now as the land was assessed land, for the rent of which the Lambardar was liable to Government, it would seem to be the duty of the Lambardar after ejecting one set of tenants to settle another tenant on the land as quickly as possible. As pointed out by the lower appellate Court the Lambardar does settle tenants: Bhagirathi (P. W. 2) says "Whenever any tenant surrenders, he (*i.e.*, the Lambardar, for defendant 5 must be a mistake for defendant 1) takes it; whenever any tenant has to be ejected he ejects him; * * * he gives leases to tenants for all kinds of lands." In the light of this statement by one of the plaintiffs it is clear that the Lambardar was acting within the authority allowed to him by custom in settling the land with defendant No. 5. It follows that the

plaintiffs cannot obtain khas possession. It is not necessary to consider whether the Lambardar could grant a *permanent* lease. All that is decided by the lower appellate Court is that the Lambardar had authority to make the settlement, and that therefore the claim for khas possession must fail.

I would dismiss the appeal with costs.

Newbould, J.—I agree.

A. N. R. C.

Appeal dismissed.

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Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.

RAJKISHORE MONDAL AND OTHERS

v.

RAJANI KANT CHUCKERBUTTY AND OTHERS. *

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May, 20.

Injunction—Bengal Tenancy Act (VIII of 1885), section 23—‘Rendering land unfit for the purpose of the tenancy’—Temporarily unfit—Release of a portion of the holding by a raiyat in favour of some of the landlords—Possession relinquished—Portion acquired for the purpose of holding market.

Section 23 of the Bengal Tenancy Act is applicable not only to cases where the land is made permanently unfit, but also to cases where the land is made temporarily unfit for the purposes of the tenancy.

Defendants Nos. 1 to 3 held a certain non-transferable occupancy holding under the plaintiffs respondents¹ and the other defendants appellants, as their landlords. The tenant defendants executed a deed of release in favour of the landlords defendants, to whom they also relinquished possession of one-tenth of the area of the entire holding (i.e. 2 bighas). The object of this release was to enable the landlords defendants to erect structures thereon and to hold a market on the site ;

Held, that the plaintiffs were entitled to obtain an injunction to restrain the defendants from altering the character of the land.

That the defendants landlords, if they were permitted to execute their design, would render the holding unfit within the meaning of section 23 of the Bengal Tenancy Act, for agriculture, for which purpose alone the land was let out to the tenants defendants.

Hari Mohan v. Surendra (1) distinguished.

* Appeal from Appellate Decree No. 1907 of 1913, against the decision of Babu Debendra Mohan Sen, Subordinate Judge of Faridpur, dated the 20th March, 1913, modifying that of Babu Bhupal Chandra Ganguly, Munsiff of Chikandi, dated the 28th March, 1912.

(1) (1907) I. L. R. 34 Calc. 718 ; L. R. 34 I. A. 133 ; 6 C. L. J. 19.

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Appeal by the landlords Defendants.

Suit to eject the defendants (landlords) and to obtain an injunction to restrain them from altering the character of the land.

The material facts and arguments are stated in the judgment.

Babus Joges Chunder Roy and Akhoy Kumar Banerjee for the Appellants.

Babu Satis Chandra Bhattacharya for the Respondents.

The judgment of the Court was delivered by

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Mookerjee, J.—The subject-matter of the litigation which has culminated in this appeal is a portion of a non-transferable occupancy holding. The first three defendants hold this tenancy, which comprises 20 bighas of land, under the plaintiffs respondents and the other defendants, now appellants, as their landlords. It appears that the tenant defendants on the 5th January 1911, executed a deed of release in favour of the landlords defendants, to whom they also relinquished possession of one-tenth of the area of the entire holding. The object of this release was to enable the landlords defendants to erect structures thereon and to hold a market on the site. This, indeed, is admitted in the written statement of the landlord defendants, who allege that as the plaintiffs had oppressed the shop-keepers of the neighbouring market, the defendants attempted to set up another market in order to protect the shop-keepers from tyranny and for the convenience of the people of the village. It has also been found that the defendants had commenced to construct huts on the land when this suit was instituted on the 18thth January, 1911, for a two-fold purpose, namely, *first*, to eject the defendants, and *secondly*, to obtain an injunction to restrain the defendants from altering the character of the land. The trial Court granted complete relief to the plaintiffs. Upon appeal by the defendants, the Subordinate Judge has dismissed the claim for ejectment on the ground that partial surrender by the tenants in favour of the landlords defendants did not operate as a forfeiture of their tenancy, though it might not bind the plaintiffs landlords. The Subordinate Judge, however, has maintained the decree for injunction. On the present appeal, the defendants have urged that the injunction should be withdrawn.

Section 23 of the Bengal Tenancy Act, which defines the incidents of occupancy right, provides that when a raiyat has a right of occupancy in respect of any land, he may use the land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy. In the present case,

it has not been disputed that the purpose of the tenancy was agricultural. As there is no evidence to show that the land would be materially impaired in value by the establishment of the proposed market, the only question in controversy is whether what the defendants have done or intend to do on the land is calculated to render it unfit for the purposes of the tenancy. It has been argued, with reference to the decision of the Judicial Committee in *Hari Mohan Misser v. Surendra Narayan Singh* (1), that in order to determine this question, it is essential that the Court should have regard to the size of the holding, the area withdrawn from actual cultivation, and the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation. But the case mentioned is clearly distinguishable. There the purpose for which a portion of the holding was withdrawn from actual cultivation, was, according to the finding of the District Judge, directly connected with agricultural pursuits, namely the erection of buildings suitable for indigo manufacture. In the case before us, the purpose for which a portion of the land is sought to be withdrawn from actual cultivation is totally unconnected with agriculture, for what the defendants seek to do is to establish a market on the site. It is immaterial that the market will occupy not more than one-tenths of the area of the entire holding; that circumstance cannot affect the nature and character of the unauthorized act. This is clearly a case where, if the defendants are permitted to execute their design, they will render the holding unfit for agriculture, for which purpose alone the land was let out to the tenants defendants. It has been argued, however, that the establishment of the market would not permanently render unfit the land for the purposes of the tenancy and that consequently the act is not objectionable under section 23. We are not prepared to accept this contention as well-founded on principle. Section 23 is applicable not only to cases where the land is made permanently unfit, but also to cases where the land is made temporarily unfit for the purposes of the tenancy. The main contention of the appellants, consequently, fails and the order for an injunction must be supported.

It is plain, however, that the injunction has been too broadly formulated and requires modification. The injunction which restrains the defendants from changing the character of the disputed land in any way so as to render it unfit for agriculture, merely reproduces the phraseology of the statute without any attempt to

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adopt it to the facts of the special case before the Court. We direct accordingly that the order of the Court below be modified and that the injunction do run in these terms: The defendants are restrained from erecting structures on the disputed land and holding a market thereon. The respondents are entitled to their costs of this appeal, as the appellants have substantially failed.

A. T. M.

Appeal dismissed: Order modified.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and
Mr. Justice N. R. Chatterjea.*

PRIYANATH BACHHER

v.

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May, 20.

MEAJAN SARDAR AND OTHERS.*

*Civil Procedure Code (Act V of 1908), Secs. 148, 149—Court fees, deficiency of
Court's discretion—Discretion, if may be challenged in appeal.*

A judge passing orders under section 149 of the Code of Civil Procedure for payment of deficit Court-fees, must be taken on the record as it stands to have exercised his discretion as provided by the section; and an appellate Court cannot go into the question as to whether he exercised his discretion in making the various orders of payment.

Appeal by the plaintiff.

Plaintiff brought a suit against the defendants for money advanced for supply of jute, in the Sealdah Small Cause Court on the 18th April, 1911, *i. e.*, the last day of limitation. The Court having no jurisdiction to try the suit returned the plaint on the 19th April, 1911, for presentation to the proper Court, and it was accordingly filed in the Munsiff's Court, Sealdah, on that very day. The plaint being insufficiently stamped, the Court passed an order on the 20th April, 1911, to pay the deficit Court-fees within a week. The Court-fees were not paid within the said period, and extensions of time for filing the deficit Court-fees were granted to the plaintiff from time to time till the 12th August, 1911, and the deficit Court-fees having been paid on the 8th August, 1911, the plaint was admitted and registered on the 15th August, 1911.

* Appeal from Appellate Decree, No. 2739 of 1913, against the decree of Babu Ashutosh Ghose, Subordinate Judge, 1st Court of District 24-Perganas, dated the 12th of May, 1913, affirming that of Babu Bhagabati Charan Kundu, Munsiff, 1st Court at Sealdah, dated the 29th of June, 1912.

The learned munsiff, having held that the plaint should be considered to have been filed on the 8th August 1911, and that the several orders granting time to the plaintiff for paying the deficit Court-fees were passed unconsciously by the Court without an opportunity of exercising judicial discretion, evidently through the laches of the ministerial officer whose duty it was to put up the record properly before the Court, dismissed the suit as being barred by limitation. On appeal the learned Subordinate Judge affirmed the decision of the Court of first instance.

Against that decision the plaintiff appealed to the High Court.

Babus Sarat Chandra Roy Chowdhury and *Dhirendra Krishna Ray* for the Appellant.

Babu Jogendra Narayan Mazumdar for the Respondents.

The following judgments were delivered :—

Jenkins, C. J.—This is an appeal from a decision of the Subordinate Judge, first Court, Alipore, affirming the decision of the first Munsiff at Sealdah. The suit was for recovery of money, and it was presented in the Small Cause Court at Sealdah on the 18th April, 1911. That Court had no jurisdiction, so it was returned on the 19th. On the same date it was presented to the Munsiff's Court. On the 29th of April an order was made on the plaintiff to pay the deficit Court-fees within a week. And this was followed by several other orders providing for payment on later dates, ultimately there was an order on the 7th August under which the balance was to be paid within five days. In fact it was paid the next day, the 8th August. Notwithstanding this it has been held that the suit was not within time and must be dismissed. This appears to me to be an erroneous reading of section 149 of the Code, which provides for the power to make up deficiency of Court-fee and for that purpose vests the Courts with powers in its discretion, at any stage, to allow the person, by whom such fee is payable, to pay the whole or part, as the case may be of such Court-fee, and upon such payment the document, in respect of which such fee is payable, is to have the same force and effect as if such fee had been paid in the first instance. In this case we have such an order as section 149 contemplates and there was payment in conformity with the terms of the order so that I can see no reason why the provisions of section 149 should not apply.

Some doubt has been suggested as to whether the Judge exercised his discretion in making the various orders to which I have referred. It appears to me impossible to go into a question of that kind. He must be taken on the record as it stands to have exercised his

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discretion as provided by section 149: The result is, in my opinion, the decree of the Subordinate Judge and of the Munsiff must be set aside and the case sent back to the Court of first instance in order that it may be heard in accordance with law.

Costs hitherto incurred will follow the result.

N. R. Chatterjea, J.—I agree.

A. N. R. C.

Appeal allowed, case remanded.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.

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MANIK CHANDRA BHOWMIK

v.

ABHOY CHARAN GOPE.*

Specific performance, suit for—Proof—Non-performance of contract, when excused—Tender of full amount.

The plaintiff who seeks specific performance of a contract has to show, *first*, that he has performed or been ready and willing to perform the terms of the contract on his part to be then performed; [*Bungsheedhur v Calcutta Auction Company* (1); *Ram v. Mullicka* (2); and *Ghillis v. Mc. Ghee* (3) referred to] and, *secondly*, that he is ready and willing to do all matters and things on his part thereafter to be done [*Walker v. Jeffreys* (4); and *Vishvanath v. Bapu* (5) referred to.] A default on his part in either of these respects furnishes a ground upon which the action may be resisted.

General Billposting Company v. Atkinson (6) referred to.

Non-performance by the plaintiff in a suit for specific performance is excused when that has resulted from the default of the vendor defendant.

Hotham v. East India Coy. (7) referred to.

A contract of sale was made orally on the 1st February, 1911. The price was fixed at Rs. 400; one rupee was paid on the date of the agreement which was to be carried out and completed within 10 days:

Held, that it was obligatory upon the vendee to tender the balance of the

* Appeal from Appellate Decree No. 3910 of 1913, against the decision of Babu Sarat Chandra Sen, Subordinate Judge of Dacca, dated the 22nd August 1913, modifying that of Babu Amrita Lal Banerjee, Munsiff of Manikgunj, dated the 8th January, 1913.

(1) (1862) 1 Hyde 45.

(2) (1870) 14 W. R. 338.

(3) (1862) 13 Ir. Ch. R. 48.

(4) (1842) 1 Hare 341.

(5) (1864) 1 Bom. H. C. R. 262.

(6) (1909) App. Cas. 118 (122).

(7) (1787) 1 T. R. 638.

purchase money to the vendor on or before the 11th February, 1911, and that as he did not do so, there was a default on his part in the performance of an essential term of the contract.

The fact that the tender of the full amount would never have been accepted by the vendor would be no ground for non-performance on the part of the vendee.

Appeal by the Defendant.

Suit for Specific performance of a contract of sale.

The material facts and argument are stated in the judgment.

Babu Dwarka Nath Chakrabutty and Dr. Nares Chunder Sen Gupta for the Appellant.

Babus Mohini Mohon Chakrabutty and Krishna Kamal Maitra for the Respondent.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the defendant in a suit for specific performance of a contract of sale, made orally on the 1st February 1911. The price was fixed at Rs. 400; one rupee was paid on the date of the agreement which was to be carried out and completed within 10 days. The case for the plaintiff is that on the 5th February, he paid a second instalment of the consideration, namely, Rs. 104, and, that, although he subsequently offered to pay the balance, Rs. 295, the defendant did not accept the money and wrongfully refused to execute the conveyance. The defendant denies the alleged payment of Rs. 104, and the Courts below have concurrently found in his favour on this point. He contends that this is not a case where a Court of equity will decree specific performance, for the plaintiff has failed, to perform his part of the obligation, and never tendered Rs. 399 as the balance of consideration. The trial Court gave effect to this contention, refused specific performance and made a decree for refund of one rupee. The Subordinate Judge has reversed this decree and has held the plaintiff entitled to specific performance as soon as he pays into Court Rs. 399 to the credit of the defendant. On the present appeal, the decision of the Subordinate Judge has been assailed as erroneous in law.

The principle applicable to cases of this description is well-settled. The plaintiff who seeks specific performance of the contract has to show, first, that he has performed or been ready and willing to perform the terms of the contract on his part to be then performed; [*Bunshedhur v. Calcutta Auction Company* (1); *Ram v. Mullicka* (2); *Ghillis v. Mc.Ghee* (3); and, secondly, that he is

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(2) (1870) 14 W. R. 338.

(3) (1862) 13 Ir. Ch. R. 48.

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ready and willing to do all matters and things on his part thereafter to be done [*Walker v. Jeffreys* (1); *Vishwanath v. Bapu* (2)]. A default on his part in either of these respect furnishes a ground upon which the action may be resisted [*General Billposting Company v. Atkinson* (3)]. In the case before us, it was obligatory upon the plaintiff as the purchaser to tender the balance of the purchase-money, namely, Rs. 399 to the vendor defendant on or before the 11th February 1911. This he did not do; consequently, there was a default on his part in the performance of an essential term of the contract. But he contends that this default is immaterial, for a tender of what has now been found by the Courts below to be the true amount of the unpaid purchase-money, would have been of no avail, because, as the Subordinate Judge has found, the defendant was anxious to resile from the contract and would have unquestionably refused to accept the money. The argument in substance is that non-performance on the part of the plaintiff is really attributable to the default of the defendant, and the defence is not sustainable, because, as pointed out in *Hotham v. East India Coy.* (4), non-performance of the plaintiff is excused when that has resulted from the default of the defendant. Here, however, the default on the part of the plaintiff was not due to default on the part of the defendant. The plaintiff defaulted to tender the balance of the consideration; all that is urged is that tender of the full amount would never have been accepted by the defendant. That, if true, does not in our opinion, improve the position of the plaintiff. There was a breach of obligation on his part, and he is consequently not entitled to the assistance of the Court.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of appeal below. The amount, if any, deposited by the plaintiff pursuant to the decree of the Subordinate Judge will be returned to him.

A. T. M.

Appeal allowed.

(1) (1842) 1 Hare 341.

(2) (1864) 1 Bom. H. C. R. 262.

(3) (1909) App. Cas. 118 (122).

(4) (1787) 1 T. R. 638.

CIVIL REFERENCE.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice Chaudhuri.

In re LINOTYPE AND MACHINERY CO. AND
WINDSOR PRESS.*

Stamp duty—Indian Stamp Act (II of 1899) Sch. I Art 5 (c)—Hire-purchase instrument—Agreement or conveyance.

An instrument described as a hire-purchase contract was entered into between A and B whereby one Linotype Machine was hired by the latter for 27 months upon terms and conditions set forth in the document. The question arose whether this is to be stamped as an agreement or a conveyance.

Held, upon the construction of the document that it is simply an agreement to hire the machinery in question, with an option on the part of the hirer to purchase and as such it is liable to be stamped as an agreement within the meaning of Art. 5 cl. (c) of Schedule I to the Indian Stamp Act and not as a conveyance.

Reference, dated 18th April, 1916, under section 57 of the Indian Stamp Act by F. J. Monahan Esq. Member of the Board of Revenue, Bengal under circumstance stated by him in the following

REFERENCE.

On the 8th June, 1914, Linotype and Machinery, Ltd., of London and Calcutta, and the Windsor Press of Calcutta, executed an instrument which is described as a Hire-Purchase Agreement whereby one duplex double-letter linotype machine was hired by the latter for 27 months upon terms and conditions set forth in the document. The principal conditions agreed to are that the hirers shall pay £135 on the execution of the deed and thereafter £540 by 27 equal monthly instalments, together with interest, and that upon payment of the full sum with the interest in the manner specified in the document, the hired machinery shall become the property of the hirers, but that until such payment is made the machinery shall continue to be on hire.

2. This document was submitted to the Collector of Stamp Revenue, Calcutta, by the Solicitors of Linotype and Machinery, Ltd., for the purpose of having it duly stamped. The Collector of Stamp Revenue, Calcutta, has raised the question whether a hire-purchase agreement is to be stamped as an agreement or as a conveyance. The applicants proposed to stamp it as an agreement and urged that in England such a document is chargeable as an

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* Civil Reference under Section 57 of the Indian Stamp Act.

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agreement under section 7 of the Finance Act, 1907. They contend that even if the agreement is taken to be a conditional sale it comes under clause (a) of the exemptions mentioned in article 5, Schedule I, of the Indian Stamp Act, 1899. They point out that there is no obligation that the machine should be purchased, and state that, in a number of cases, the machine is returned to the owners after it has been hired for a certain period. The Collector points out that the provisions of section 7 of the English Act cannot be followed here, and that it is necessary to consider how such an instrument should be dealt with under the Indian Stamp Act, as there is no special provision for the stamping of a "hire-purchase" instrument in Schedule I thereof. He holds that the instrument comes within the term "conveyance" as defined in section 2 (10) of the Indian Stamp Act, and is liable to be stamped as such.

3. The Legal Remembrancer, who was consulted, considers that there are good grounds for holding that the instrument under consideration comes within the definition of conveyance and should be stamped in the manner suggested by the Collector. The Board concurs with the opinion of the Legal Remembrancer, but considers that the question how a hire-purchase agreement should be stamped is of such importance as to render it necessary that a reference should be made to the Hon'ble High Court for an authoritative decision under section 57 of the Act.

4. Printed copies of the document in question, of the Collector's letter of the 28th January 1916 and of the Solicitors' letter of the 6th January 1916, are submitted herewith :

No. 6 R S., dated Calcutta, the 28th January 1916.

From—Rai J. M. Das Bahadur, Collector of Calcutta,

To—The Commissioner of the Presidency Division.

Under the provisions of section 56 (2) of the Indian Stamp Act II of 1899, I have the honour to submit the accompanying instrument with a view to obtain a decision of the Chief Controlling Revenue Authority as to the correct amount of stamp duty which the same attracts.

2. The document on which no stamp duty was paid at the time of execution was produced for validation under the Stamp Act on payment of annas 8 which was suggested by the applicants, Messrs. Watkins & Co., as the proper duty leviable thereon. The instrument which is described as a hire-purchase contract, was entered into on the 8th June 1914, between the Linotype and Machinery, Limited, of London and Calcutta, called the "Company" of the one part and the "Winnsor Press," of Calcutta, called the "Hirers" of the other

part. The parties agree to let and to hire a machine for a term of 27 months, upon terms and conditions set forth in the document and for the purpose of the agreement the hired machinery is valued at £675 or Rs. 10,125. It is agreed that the hirers shall pay the Company as hire the sum of £675 and interest by 27 equal monthly instalments and that upon payment of the full sum the said hiring shall cease and determine and the hired machine shall thenceforth be the property of the hirers.

3. In their letter dated the 6th January 1916, the applicants have given their reasons for holding that a duty of annas 8 only is payable on the instrument. They say that in England a hire-purchase agreement is chargeable as an agreement with a stamp duty of 6d. under section 7 of the Finance Act of 1907. They state that the agreement is not a conditional sale and they contend that if it is taken to be a conditional sale it must be held that it comes under clause (a) of the exemptions mentioned in article 5 of Schedule I to the Stamp Act. The principal question for consideration they say is whether the ownership of the machine is transferred from one party to another. They express the opinion that the instrument in question falls short even of an agreement to convey, one party giving the other only an option to purchase the machinery at a certain price. It is said that there is no obligation on the other party to purchase the machine and that in a number of cases the machine is returned to the owner after the same has been hired for a certain period.

4. The contention that under section 7 of the English Finance Act of 1907 such an instrument is chargeable as an agreement with a stamp duty of only 6d. does not seem to be correct. An extract of section 7 is given below :—

“Para. 7.—Any agreement for or relating to the supply of goods on hire whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied, shall be charged with stamp duty as an agreement, or, if under seal (or in Scotland with a clause of registration), as a deed, as the case requires, and the exemption numbered (3) under the heading ‘Agreement or any Memorandum of an Agreement’ in the First Schedule to the Stamp Act, 1891 (which exempts agreements for the sale of goods), shall not apply in the case of any such instrument.”

It will be seen that a hire-purchase agreement is chargeable as an agreement if under hand only and as a deed if under seal. The instrument in question is a document under seal and as such is

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liable to be charged as a deed. The distinction between an instrument under seal and an instrument under hand only is not recognized by the Indian Stamp Act. This is clear from the different definitions of the terms "Executed" and "Execution" in the two Acts which are given below :—

Definition in the Indian Stamp Act. "Executed" and "Execution" used with reference to instrument mean "Signed" and "Signature."

Definition in the English Stamp Act. The expression "Executed" and "Execution" with reference to instruments *not under seal* mean "Signed" and "Signature."

A deed under seal being not distinguished in the Indian Stamp Act from a deed under hand only, the provisions of section 7 of the English Act cannot be followed here. It is necessary, therefore, to consider how such an instrument should be dealt with under the Indian Stamp Act. The nature of such an instrument is very clearly described in section 7 of the Finance Act quoted above. It is an "agreement for or relating to the supply of goods on hire whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied." There is clearly a transfer in such a transaction within the meaning of section 5 of the Transfer of Property Act. The interest acquired by the transferee is of the nature of a contingent interest as defined in section 21 of the Transfer of Property Act. It seems that an instrument creating such a right comes within the scope of the term conveyance which, as defined in section 2 (10) of the Indian Stamp Act, includes not only a conveyance on sale, but every instrument by which property, whether moveable or immoveable, is transferred *inter vivos* and which is not otherwise specifically provided for in Schedule I. A "hire-purchase" agreement is not specifically provided for in Schedule I. A hiring agreement is so provided for, but a "hire-purchase" agreement is something more than a mere hiring agreement. It would seem, therefore, that the instrument in question is chargeable as a conveyance under the Indian Stamp Act.

5. As regards the contention that if the instrument be treated as a conveyance, it should be exempted from stamp duty altogether under clause (a) of the exemptions under article 5 of Schedule I to the Stamp Act, I beg to state that section 7 of the English Finance Act specifically provides that the exemption is not applicable to a "hire-purchase" agreement. It does not appear that there is anything in the Indian Stamp Act favouring a contrary conclusion.

6. It will be seen from the letter of the applicant referred to above that hire-purchase agreements are executed in large numbers

in this country. The question as to the proper stamp duty payable on such documents is, therefore, one of considerable importance. In England it has been necessary to make special provision for such documents. It is desirable, therefore, that there should be an authoritative ruling on the point here.

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Dated Calcutta, the 6th January 1916.

Demi-official from—Messrs. Watkins & Co., Solicitors,

To—The Superintendent of Stamps, Calcutta Collectorate.

Re : *hire-purchase agreement*.

Your letter of the 4th instant. The agreement in question is in a form in common use in Calcutta and India and great numbers of these agreements, to our knowledge, are used by the vendors of machinery, motor-cars, typewriters and other engineering goods. During the past 15 years all such agreements that have passed through our hands, totalling some hundreds, have been stamped annas 8 each, and no question has ever been raised before as to the sufficiency of the stamp. In England, a hire-purchase agreement is chargeable with stamp duty as an agreement (*i.e.*) 6*d.* (see section 7 of the Finance Act, 1907).

The agreement is specially drawn so as to prevent any title in the goods passing and we fail to understand the Controller's contention that the agreement is a conditional sale. Even were his contention correct, it appears to us that the agreement would then fall under exemption (a) to article 5 of the Stamp Act, as being "an agreement for or relating to the sale of goods of merchandise exclusively in which case it is not liable to duty at all."

The whole question really is as to whether the ownership of the machine is transferred from one party to the other. The deed itself clearly says that the property is hired and there is an option to the hirer to buy the property at a fixed price should he so desire. The matter is one of great importance to the mercantile community, as one of the main objects of a hire-purchase agreement is to prevent the machinery vesting in the Official Assignee in the event of the hirer becoming insolvent.

Lord Esher has clearly laid down that the duty on a conveyance only attaches when the parties proceed to that conveyance and an agreement to convey is not in itself a conveyance [see *Commissioners v. Angus* (1)].

(1) (1889) L. R. 23 Q. B. D. 579 (594, 596).

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In our opinion the present instrument falls short even of an agreement to convey as, as already pointed out, one party gives the other an option to purchase the machinery at a certain price. There is no obligation whatever on the other party to purchase and in a number of cases they do not do so and the machine is returned to the owners after the same has been hired for a certain period.

Agreement for the hire of machinery (document).

H. P. C. (India.)

An Agreement made the eighth day of June 1914 between Linotype and Machinery Limited of 188 and 189 Fleet Street in the City of London and of Calcutta (hereinafter called "the Company") of the one part and the Windsor Press of 11 British Indian Street, Calcutta (hereinafter called "the Hirers") of the other part.

Whereby it is agreed as follows :—

1. The Company hereby agree to let to the Hirers and the Hirers hereby agree to hire for the purpose of carrying on the Hirers' business of printing, one duplex double letter Linotype Machine (hereinafter referred to as "the hired machinery") for the term of 27 months from the date of delivery of the machinery upon the terms and conditions herein contained and for the purposes of this agreement the hired machinery is hereby admitted and agreed to be of the value of £675 or Rs. 10,125 f.o.b. English port.

2. The hired machinery shall be erected by the Company upon the premises of the Hirers at 11, British Indian Street, Calcutta, as soon as the Company are reasonably able to deliver the same but the Hirers shall not have any right or power to cancel or rescind this agreement in case of any delay in delivery of the hired machinery or any part thereof arising through strikes, combinations of workmen, lock-out of workmen, or any other cause whatever beyond the control of the Company nor shall the Company under any circumstances be under any liability to the Hirers for any damage or loss directly or indirectly caused by or attributable to delay in delivery of the Hired Machinery or any part thereof arising from any cause whatever. The Company will supply free of charge the services of a skilled mechanic for the erection of the hired machinery, any other labour employed in erecting the hired machinery shall be at the cost of the Hirers.

3. The Hirers shall pay the Company as hire the sum of £675 or Rs. 10,125 and interest as follows :—£135 or Rs. 2,025 to be paid on the execution of this agreement and the sum of £540 or

Rs. 8,100 by 27 equal monthly instalments of £20 or Rs. 300 each the first of such monthly instalments to be paid one month after erection of the machinery and the remaining instalments on the corresponding day of every first calendar month thereafter and also together with each such monthly instalments interest for that month upon that instalment and all the remaining future instalments at the rate of six per cent. per annum, such interest in the case of the first of such monthly instalments being calculated from the date of erection of the hired machinery. All charges for packing, freight, marine insurance, landing, clearing, &c, shall be paid by the Hirers to the Company on delivery of the machinery. If the Hirers shall fail to pay any such instalment and interest or any part thereof on the due date thereof the amount so in arrear shall bear interest until payment at the rate of seven and one-half per cent. per annum. The Hirers shall on the execution of this agreement hand to the Company customary trade bills for the respective amounts of the said instalments of hire and interest payable under this agreement and such bills shall respectively be made payable on the dates on which such instalments and interest are respectively payable under this agreement and shall bear interest at the rate of seven and one-half per cent. per annum after due date. The said bills shall be a collateral security for the payment of the said instalments and interest and the giving thereof shall not suspend or affect any of the remedies of the Company hereunder.

4. The Hirers shall not during the continuance of this agreement in any way sell, assign, sub-let or otherwise part with the possession of the hired machinery or any part or parts thereof or assume the ownership thereof or remove from the said premises or from one building to another the hired machinery or any part or parts thereof or attempt so to do or part with possession of their interest in the said premises where the hired machinery is kept without first informing the Secretary of the Company of such intended removal and receiving his consent in writing to do so. The hired machinery shall at all times be at the risk of the Hirers who shall bear any loss arising from the destruction or loss thereof or damage thereto however caused and shall take all reasonable care thereof during the hiring period and shall permit the Company or its Agents at all reasonable times to inspect the same and if at any such inspection any part or parts of the hired machinery shall be found broken, damaged or destroyed the Hirers shall forthwith at their own expense and to the satisfaction of the Engineer of the Company replace and repair the parts so broken, damaged or destroyed. The Hirers shall

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not at any time during the hiring purchase any parts or matrices as may be required to be used with or in connection with the hired machinery except from the Company who shall from time to time supply the same at their ordinary prices current in India at the respective dates when such parts or matrices are ordered.

5. The Hirers shall punctually pay all rent, rates and taxes payable in respect of the premises where the hired machinery or any part thereof is kept and shall upon demand produce to the Company or its Agents the current receipts for the said rent, rates and taxes, and in the event of the same being in arrear the Company is hereby empowered to pay the same and any expenses attendant thereon and the Hirers shall on demand repay to the Company any sum so paid.

6. The Hirers shall at all times during the hiring keep affixed in a conspicuous position or positions on the hired machinery such plate or plates as the Company may provide for denoting that the hired machinery is the property of the Company and the Hirers shall not at any time during the hiring remove or obliterate any of such plates or allow the same to be removed or obliterated.

7. The Company shall insure the hired machinery against fire in a recognized Tariff Fire Insurance Office in the sum of £690 or Rs. 10,350 and the Hirers shall on demand repay to the Company the premiums paid. The Company shall if requested produce to the Hirers the policy of insurance and the receipts for the current premiums payable for such insurance.

8. If any of the said instalments of hire or any part thereof shall be in arrear and unpaid for one calendar month after the same shall have become due or if the Hirers shall at any time fail or neglect to perform or observe any of the agreements or provisions herein contained and on their part to be performed and observed or if a distress or execution shall be levied or issued upon or against any of the chattels or property of the Hirers or if an order shall be made or an effective resolution passed for the winding up of the Hirers or if a Receiver shall be appointed of the undertaking of the Hirers or any of their assets, then and in any such case the Company may without notice to the Hirers terminate the hiring and may by its servants or Agents without any previous notice to the Hirers enter upon and into any premises or buildings where the hired machinery or any part or parts thereof may be and seize, retake possession of and remove the same to such place as the Company may think fit notwithstanding any payments previously made by the Hirers.

9. If the hiring shall be determined under clause 8 hereof no

person shall have any claim or demand against the Company in respect of any payments previously made by the Hirers all of which shall in every such case as aforesaid be absolutely forfeited and the Company shall be entitled to recover from the Hirers or their estate all instalments of hire then in arrear (if any) with interest thereon as aforesaid and a proportionate part of the current instalment and interest up to the date of the determination of the hiring and in addition such sum (if any) as shall be required with the money so to be paid for hire (exclusive of interest) and the sum previously paid for hire (exclusive of interest) to make up a sum equal to 60 per cent. of the amount of £675 or Rs. 10,125 payable as hire under clause 3 hereof and the Company shall also be entitled to recover from the Hirers or their estate all costs and expenses including levy incurred in or about the entry, seizure and removal under this agreement and the Hirers shall not nor shall any person claiming through them commence or maintain any action, counter-claim or proceeding against the Company its servants or Agents by reason of the Company taking possession of the hired machinery or by reason of the temporary possession by the Company of the premises where the hired machinery or any part thereof may be for such time as may be reasonably occupied in its removal.

10. The Hirers may determine the hiring on any of the monthly days hereinbefore appointed for payment upon giving to the Company three calendar month's previous notice in writing of their intention so to do specifying the date on which the hiring is to terminate and upon delivering up the hired machinery to the Company on or before that date carriage paid and in good repair as provided by clause 4 hereof at such place in India as the Company may appoint and at the same time paying to the Company all monies payable hereunder up to that date and in addition such sum (if any) as with the sums then and previously paid for hire (exclusive of interest) shall be required to make up a sum equal to 60 per cent. of the total amount of £675 or Rs. 10,125 payable as hire under clause 3 hereof.

11. If the hiring hereby constituted shall be determined under clause 8 or clause 10 the Company shall upon payment of all sums payable under clause 9 or clause 10 hereof as the case may be return to the Hirers duly cancelled such of the bills mentioned in clause 3 hereof as shall not at the time of such payment have fallen due.

12. Upon payment by the Hirers to the Company of the full sum of £675 or Rs. 10,125 an interest payable hereunder before or on the days and in manner aforesaid the hiring shall cease and determine and the hired machinery shall thenceforth be the property

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of the Hirers but until such full payment the hired machinery shall remain the sole and absolute property of the Company, and is only let on hire to the Hirers.

In Witness whereof the Hirers have caused their common seal to be hereunto affixed the day and year first above written.

The common seal of the Windsor Press was hereunto affixed—

G. F. BRIDGE, *Proprietor*.

{ H. ROWLAND, *Manager*.

In the presence of { A. N. WARDLEY, *Assistant Manager*,
Linotype Machinery, Limited.

[*The Company's representatives are not authorized to consent to any alteration of this Agreement.*]

MEMORANDUM FOR LANDLORD.

To Linotype and Machinery Limited.

In consideration of your supplying to the withinnamed Hirers the withinmentioned machinery upon the terms of the within agreement I, the undersigned.....of.....being, the landlord of the premises within mentioned at which the said machinery is to be placed hereby agree with you that I will not at any time hereafter during the continuance of the said agreement distrain or take the said machinery or any part thereof for rent in arrear or otherwise, and that I will at any time or times allow the same to be removed by you or the said Hirers from the said premises without notice and without any charge whatever.

Signature.....

Name of witness.....

Address of witness.....

Occupation of witness.....

Sir S. P. Sinha, Advocate General (with him *Mr. A. P. Sinha*) for the Board of Revenue conceded that in view of the case of *Helby v. Mathews* (1) the opinion expressed by the Board could not be supported.

Mr. P. L. Buckland for the Company was not called upon.

The following judgments were delivered :

Sanderson, C. J.—In this case, I am of opinion that the document in question is an agreement and not a conveyance.

The document in question has been somewhat loosely described in the reference to us as a Hire-purchase agreement. In order to ascertain what the real effect of the document is, we must of course

(1) (1895) App. Cas. 471.

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look at the terms of the document ; and, I am bound to say that when I heard the document read by the learned Advocate-General the thought that came to my mind was that the point was not arguable. Therefore, I was not at all surprised to hear the learned Advocate General say, as one would expect him to say under such circumstances, that in his opinion the point was not arguable. Even apart from the decision in *Helby v. Mathews and others* (1), which has been cited to us, it is obvious upon the face of the document in question that it is an agreement and nothing more than an agreement. Further than that, it is not even an agreement to purchase but simply an agreement to hire the machinery in question, with an option on the part of the hirer to purchase.

Under those circumstances, in my judgment, the answer which must be given to this reference is that the document in question is an agreement within the meaning of Article 5 Clause (c) of Schedule I to the Indian Stamp Act, and is therefore liable to a stamp duty of eight annas.

Mookerjee, J.—I agree.

Chaudhuri, J.—I agree.

Government Solicitors—Attorneys for the Board of Revenue.

Watkins & Co.—Attorneys for the Company.

D. K. R.

(1) (1895) App. Cas. 471.

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APPELLATE CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh
Mookerjee, Knight, Judge.*

BHAIGANTA BEWA

• v.

HIMMAT BIDYAKAR AND ANOTHER.*

Landlord and tenant—Tenant, if can contest landlord's title—Tenancy, expiration of—Possession—Estoppel—Indian Evidence Act (I of 1872), Secs. 115, 116, if exhaustive.

According to the law of England a person who has been let into possession as a tenant is estopped from denying his lessor's title without first surrendering possession.

* Letters Patent Appeal, No. 93 of 1913, against the decision of Mr. Justice B. K. Mullick, dated the 24th June, 1913, in Appeal from Appellate Decree No. 1557 of 1912, against the decree of Moulvie Ali Ahmad, Subordinate Judge, 2nd Court, at Dacca, dated the 8th March, 1912, reversing that of Babu Manmatha Nath Bose, Munsiff, 3rd Court, at Naraingunj, dated the 11th September 1911.

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Doe v. Smythe (1), *Alchorne v. Gomme* (2), *Doe dem Joseph Manton v. Austin* (3), *Tadman v. Henman* (4) and *Bayley v. Bradley* (5) referred to.

The position, however, is different when the tenant had possession before he took the lease.

Accidental Death Insurance Co. v. Mackenzie (6) referred to.

Per Mookerjee J.—Enjoyment by permission is the foundation of the rule, that a tenant shall not be permitted to dispute the title of his landlord. Two conditions are essential to the existence of the estoppel, first, possession, secondly, permission; when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues.

The above doctrine was also unquestionably the law in this country before the Indian Evidence Act was passed.

Mohesh Chunder Biswas v. Gooroo Persad Bose (7), *Vasudev Daji v. Babaji Ranu* (8), *Banee Madhub Ghose v. Thakoor Dass Mundal* (9), *Messrs Burn & Co. v. Rusho Moyee Dossee* (10) and *Jainarayan Bose v. Kadimbini Dasi* (11) relied on.

The law has not in this respect been altered by the Indian Evidence Act, and now, as before, a tenant who has been let into possession, is estopped from denying the landlord's title without first surrendering possession.

Mutahunaiyan v. Sinna Samavaiyan (12) and *Trimbak Ramchandra Pandit v. Shekh Gulam Zilani Waiker* (13) referred to.

Sections 115 and 116 of the Indian Evidence Act are not exhaustive, and there may be rules of estoppel applicable other than what is contained in those sections.

The Ganges Manufacturing Co. v. Sourujmull (14) and *Rup Chand Ghose v. Sarbessur Chandra Chunder* (15) followed.

Section 116 of the Act cannot imply that after the expiration of the tenancy, the tenant is free to dispute the title of the landlord, although he retains possession which he had obtained by the permission of the landlord.

Ammu v. Ramakishna Sastri (16) and *Subbaraya v. Krishnappa* (17) distinguished.

Appeal by the Plaintiff, Bhaiganta Bewa.

This appeal arose out of a suit brought by the plaintiff for recovery of possession of about 1½ kanis of land after declaration of her title thereto. The allegation of the plaintiff was that the land was

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| (1) (1815) 4 M. & S. 347. | (2) (1824) 2 Bingham 54. |
| (3) (1832) 9 Bingham 41. | (4) (1893) 2 Q. B. 168. |
| (5) (1848) 5 C. B. 396. | (6) (1861) 5 L. T. N. S. 20. |
| (7) (1863) Marshall 377. | (8) (1871) 8 Bom. H. C. R. 175. |
| (9) (1866) B. L. R. Sup. Vol. 588. | (10) (1870) 14 W. R. 85. |
| (11) (1869) 7 B. L. R. 723 Foot note. | (12) (1905) I. L. R. 28 Mad. 526. |
| (13) (1909) I. L. R. 34 Bom. 329. | (14) (1880) I. L. R. 5 Calc. 669. |
| (15) (1906) 10 C. W. N. 747. | (16) (1879) I. L. R. 2 Mad. 226. |
| (17) (1888) I. L. R. 12 Mad. 422. | |

the jote land of her mother Budhi Bewa, and she had obtained it by succession, and settled it in *burga* with her husband's brother, the defendant No. 1, Himmat Baidyakar, for a year; and that the tenancy having expired, defendant No. 1 refused to deliver possession, and denied her title. Hence this suit for ejectment, and recovery of damages.

Defendant No. 1 contended *inter alia* that the disputed land originally belonged to him and his brother Kiamuddi (plaintiff's husband), and that after Kiamuddi's death he was holding the land by virtue of inheritance. He denied that it was the property of plaintiffs' mother.

The Court of first instance decreed the suit. On appeal the learned Subordinate Judge found that the holding was the property of plaintiff's husband, and not of her mother. He also held that although the defendant did take settlement in *burga* from the plaintiff, but the period of the lease having expired he was not estopped from setting up his own adverse title by right of inheritance.

Against that decision plaintiff preferred an appeal to the High Court and Mr. Justice Mullick affirmed the decision of the learned Subordinate Judge by the following judgment :

The plaintiff claims the disputed land as part of a holding, which she inherited from her mother and which she leased to the defendant in 1316 for one year by a *burga* settlement. The tenancy expired on the 30th Paus, 1317. On 20th Magh, 1317, the plaintiff brought the present suit to eject the defendant. The defendant pleaded that the holding was the property of the plaintiff's husband who was his brother and that by right of inheritance he had a share in it. He denied that it was the property of plaintiff's mother. The Munsiff decreed the suit. On appeal the Subordinate Judge found that the holding was not the property of the plaintiff's mother but the property of the plaintiff's husband. The Subordinate Judge also found that the defendant had been let into the land in 1316 by the plaintiff as alleged ;but that as the period of this lease had expired the defendant was not estopped from setting up his own adverse title by right of inheritance. The Subordinate Judge therefore dismissed the suit. The plaintiff appeals. The only point is whether under section 116 of the Evidence Act the defendant is estopped from denying the plaintiff's title. I think the answer is in the negative. In England the tenant in possession cannot, even, after the expiration of his lease deny his landlord's title without actually and openly surrendering possession to him or being evicted by title paramount or at least giving notice to his landlord that he shall claim under

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another and valid title. But in India the expression holding over means that the relation of landlord and tenant continued with the assent of both parties and the overt acts by which the relation might be continued are either the receipt of rent by the landlord or his assenting to the continuance of the tenancy by either acts or words. *Ratan Lal Gir v. Farshi Bibi* (1). In the present case the learned Vakil for the appellant cannot state what overt acts denoting the assent of the landlord have been done and indeed the Subordinate Judge by implication finds that there has not been any such assent on the part of landlord. In these circumstances the appeal fails and is dismissed with costs.

Against this decision the plaintiff preferred an appeal under section 15 of the Letters Patent.

Babu Prakash Chandra Pakrasi (with him *Babu Tarakesur Pal Chaudhuri*) for the Appellant. The Courts below found that the defendant entered into possession of the land under a *burga* settlement from the plaintiff. Although the term of the lease was over he remained in possession of the land. Defendant is estopped from denying his landlord's title. A tenant must give up possession before he can assert title against landlord. The English law on the subject is perfectly clear : a tenant in possession cannot deny his landlord's title even after the expiration of his lease : See *Board v. Board* (2), *Pickard v. Sears* (3), *Doe v. Oliver* (4). The same principle applies also to India. Referred to *Bankala Vittil Usman Koya v. Chidriamokkause Akoth* (5) and *Muthunaiyan v. Sinna Samavaiyan* (6). Section 116 of the Indian Evidence Act is not exhaustive : *The Ganges Manufacturing Co. v. Sourujmull* (7), and *Sarat Chunder Dey v. Gopal Chunder Laha* (8). There may be rules of estoppel applicable to India other than those contained in sections 115 and 116 of the Indian Evidence Act. Such matters must be dealt with on broad general principles : *Rup Chand Ghose v. Sarbessur Chandra Chunder* (9). Referred also to Caspersz on Estoppel, 4th Ed. p. 239, and Bigelow on Estoppel, 6th Ed. p. 570.

Babu Rajendra Chandra Guha for the Respondent: The finding as to *burga* settlement is not inconsistent with the defendants having been previously in possession of the lands in dispute.

(1) (1907) I. L. R. 34 Calc. 396.

(2) (1873) L. R. 9 Q. B. 48.

(3) (1837) 6 A. & D. 469.

(4) (1829) 34 R. R. 358.

(5) (1904) 15 M. L. J. 368.

(6) (1905) I. L. R. 28 Mad. 526.

(7) (1880) I. L. R. 5 Calc. 669.

(8) (1892) I. L. R. 20 Calc. 296.

(9) (1906) 3 C. L. J. 629.

Defendant cannot therefore be estopped: See *Lal Mahomed v. Kallanus* (1).

The tenancy had terminated, so the rule of estoppel was not applicable to the case. Section 116 of the Evidence Act does not apply. The legislature made a deliberate departure from the law of England on this point. The author of the Indian Evidence Act, Sir Fitz-James Stephen, in article 103 of his Digest of the law of Evidence (as applicable to England), which corresponds to section 116 of the Indian Evidence Act, uses the words "till he has given up possession" which are wanting in section 116 of the Indian Act. Legislature intended that in India estoppel will terminate with the termination of the tenancy.

Section 116 is exhaustive. If there is a statutory provision on a subject it is to be looked upon as exhaustive unless it leads to incongruities.

For the purpose of avoiding multiplicity of suits, instead of compelling the defendant to relinquish possession and then sue for enforcement of his own right, the whole case can be decided once for all. The Courts in India being judges of both facts and law, there is no ground for adopting the circuitous procedure sanctioned by English law.

Defendant's admission of the plaintiff's title and privity of possession, as recited in the lease, does not operate as estoppel.

A separate suit by the tenant may be barred by the principles of res-judicata.

A tenant may question the title of his landlord when the tenancy ceases: See *Ammu v. Ramkishna Sastri* (2) and *Subbaraya v. Krishnappa* (3).

The following judgments were delivered:

Sanderson, C. J.—In this case the suit was brought for ejectment.

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In the first Court the plaintiff was successful and obtained a decree.

In the first appellate Court, however, the plaintiff's suit was dismissed and was dismissed, on the ground that the defendant had succeeded in proving that he was entitled to the land. The learned Subordinate Judge further found, on my reading of his judgment, on the second issue which was 'whether the land was settled with the defendant by the plaintiff in *Barga*,' that the plaintiff had

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(1) (1885) I. L. R. 11 Calc. 519. (2)-(1879) I. L. R. 2 Mad. 226.

(3) (1888) I. L. R. 12 Mad. 422.

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settled the land with the defendant as alleged by the plaintiff, but that inasmuch as the tenancy had come to an end, section 116 did not apply, and therefore the defendant was entitled to set up his own title against that of the plaintiff.

It appears that the plaintiff alleged that the land was her and she had obtained it by succession and settled it with defendant on the 14th of January, 1910, for a year's tenancy, which would of course come to an end on the 14th of January, 1911. The rent was payable in kind, being half share of the profits of the land. The half-share of the jute cultivated on the land was delivered to the plaintiff, but the half-share of the other crop was not so delivered: and, on the 25th of February 1911, after the tenancy had expired, this suit was instituted.

Now, in my judgment the plaintiff was entitled to obtain a decree for possession of the land, because the learned Subordinate Judge had found in favour of the plaintiff in respect of the tenancy of 1910; and, in view of that finding, in my judgment, the defendant was not entitled to set up his title against that of the plaintiff without in the first instance going out of possession and restoring possession which the plaintiff had delivered to him by means of the tenancy of 1910. This principle was laid down so long ago as 1832 by Chief Justice Tindal in the case of *Doe dem Joseph Manton v. Austin* (1), in these words, "The principle is that a tenant shall not contest his landlord's title; on the contrary, it is his duty to defend it. If he objects to such title, let him go out of possession."

Now, this was the law of India before the Evidence Act was passed. It is contended, however, that by reason of section 116 of the Evidence Act, this principle of law to which I have referred does not apply. Section 116 says, "No tenant of immovable property or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given."

It is argued on behalf of the respondent in this case that that section is exhaustive with regard to the point with which it deals and that the intention of the Legislature was to alter the law to which I have just referred. In my judgment, that is clearly not so. It has been decided by this Court in *The Ganges Manufacturing & Co. v.*

Sourujmull (1), that sections 115 to 117 of the Evidence Act are not exhaustive ; and the judgment of the late Chief Justice Sir Richard Garth to which I wish to draw attention is at page 678. There he is reported to have said : " It has been further contended by the appellants, that sections 115 to 117 contained in Chapter VIII of the Evidence Act lay down the only rules of estoppel which are now intended to be in force in British India ; that those rules are treated by the Act as rules of evidence ; and that by section 2 of the Act, all rules of evidence are repealed, except those which the act contains. But if this argument were well founded, the consequences would indeed be serious. The Courts here would then be debarred from entertaining any questions in the nature of estoppel which did not come within the scope of sections 115 to 117, however important those questions might be to the due administration of the law." I desire to point out that the principle of law which was laid down by Chief Justice Tindal to which I have referred is a matter of great importance.

It is not a matter of mere question of form whether the person who has been a tenant should be the plaintiff or the defendant, in a suit to establish the title of one or the other : it is a matter of substance, and in order to show that, one may take as an example a case which is by no means unfrequent, where two parties are claiming title to certain land, and both parties have considerable difficulty in producing strict proof of their title to the land ; in such a case as that, possession is of great importance, because the party who is in possession of the land has great advantage in such a suit ; for, unless the party, who is out of possession, can satisfy the Court and discharge the burden which lies upon him to prove that he has got good title to the land, the person who is in possession, remains in possession of the land. Therefore, in my judgment it is a matter of great importance that the principle of law to which I have referred should be affirmed.

In the Court of first instance and also in the first Appellate Court another question was enquired into and a decision was arrived at upon it, namely, whether the plaintiff was in reality the owner of the land, or whether the defendant was in reality the owner of the land. In my judgment, that question was quite immaterial, as soon as it had been decided by the learned Judge that the defendant had been let into possession of the land under a tenancy granted by the plaintiff ; this case must be decided as if that other question, which in my opinion was immaterial, had not been decided at all.

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For these grounds I am of opinion that the appeal from the learned Judge's judgment ought to be allowed, and the result is that the plaintiff is entitled to the possession of the land, and she is also entitled to such damages as the Munsiff awarded her (that I understand to be Rs. 5) for the defendant wrongfully retaining possession.

The plaintiff is entitled to her costs in all the Courts.

Mookerjee J.—The facts material for the determination of the question of law raised before us are not in controversy. On the 14th January 1910, the plaintiff let out the land in suit to the defendant for a term of one year and placed him in possession. The tenancy expired on the 14th January 1911; but the defendant refused to deliver up possession to the plaintiff; the result was the institution of this suit for ejectment on the 4th February 1911. The defendant resisted the claim on the allegation that the plaintiff had no exclusive title to the property at the date of the lease in his favour; his case was that the plaintiff had inherited the property not from her mother, as she alleged, but from her husband who was the brother of the defendant; consequently, upon the death of her husband, the property would, under the Mahomedan law, descend, not to her alone but to her along with the defendant and other possible heirs. The court of first instance made a decree in favour of the plaintiff. Upon appeal, that decree was reversed. On appeal to this court, the decree of the court of appeal below has been affirmed by Mr. Justice Mullick, who has over-ruled the contention of the plaintiff that the defendant was bound by the doctrine of estoppel and could not challenge the title of the plaintiff. Reliance was placed by the plaintiff in section 116 of the Indian Evidence Act which provides that "No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property." To this, the defendant answered that as the tenancy here had terminated, the rule of estoppel was no longer applicable. This contention found favour with Mr. Justice Mullick and the result was that the suit was dismissed.

It has not been disputed before us that according to the law of England a person who has been let into possession as tenant by the plaintiff is estopped from denying his lessor's title without first surrendering possession. Reference may be made to *Doe v. Smythe* (1), decided in 1815. Where the tenant in possession paid rent to the lessor and then disclaimed. Bayley J. observed that

(1) (1815) 4 M. & S. 347.

"the tenant should have given up the possession to Knight (the lessor), and then the defendant, if she has title, might have maintained her ejectment." Mr. Justice Dampier added. "It has been ruled often that neither the tenant, nor any one claiming by him can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord. This, I believe, has been the rule for the last 25 years, and I remember was so laid down by Buller J. upon the Western Circuit." *Doe v. Pegge*, (1). This exposition of the law has been repeatedly re-affirmed : *Alchorne v. Gomme* (2) ; *Doe dem Joseph Manton v. Austin* (3) ; *Tadman v. Henman* (4). There is an instructive discussion on this subject in *Bayley v. Bradley* (5) to which reference may usefully be made. In the course of the argument in that case, Wilde, C. J. observed : "Does the lease operate as an estoppel except during the term ?" Serjt. Byles answered "A tenant is at all times estopped from disputing the title of his landlord," and referred to a long line of cases including *Doe v. Smythe* (6). At a later stage of the argument, Mr. Justice Vaughan Williams repeated the question "whether the estoppel does not end with the term." Serjt. Byles answered : "the estoppel is limited in point of extent ; but there is no authority for saying that it is limited in point of time." Wilde, C. J. then intervened with the following observation : "In Co. Litt. 47 b, it is said that 'if a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended ; for, by the making of the lease, the estoppel doth grow, and, consequently, by the end of the lease the estoppel determines.' The only qualification I am aware of that has been engrafted upon that rule, is, "that if the tenant *came into possession* under the lessor, he must restore the possession before he disputes the title." The position is different as Erle C. J. pointed out in *Accidental Death Insurance Co. v. Mackenzie* (7), when the tenant had possession before he took the lease.

Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions, then, are essential to the existence of the estoppel, *first*, possession, *secondly*, permission ; when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues. That this was unquestionably the law in this

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(1) (1785) 1 T. R. 758 n.

(2) (1824) 2 Bingham 54.

(3) (1832) 9 Bingham 41.

(4) (1893) 2 Q. B. 168.

(5) (1848) 5 C. B. 396.

(6) (1815) 4 M. & S. 347.

(7) (1861) 5 L. T. N. S. 20.

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country before the Indian Evidence Act was passed, is clear from a long line of decisions. The doctrine was expressly formulated in *Mohesh Chandra Biswas v. Goormo Persad Bose* (1); *Vasudeb Daji v. Babaji Ranu* (2), and was impliedly recognised in *Banee Malhub Ghose v. Thakoor Doss Mundul* (3); *Gouree Doss Byragee v. Jugurnath Roy Chowdhury* (4); *Messrs. Burn & Co. v. Rusho Moyee Dossee* (5); *Jainarain Bose v. Kadimbini Dasi* (6). We have further the weighty opinion of Sir Subramanya Ayyar, C. J. expressed in the case of *Muthunaiyan v. Sinnu Samavaiyan* (7) that the law has not in this respect, been altered by the Indian Evidence Act and that now, as before, a tenant who had been let into possession was estopped from denying the landlord's title without first surrendering possession [see also *Trimbak Ramchandra Pandit v. Sheikh Gulam Zilani Waiker* (8)].

The respondent, however, has contended that this view is erroneous and that the law as embodied in section 116 of the Indian Evidence Act is an intentional departure from the English law on the subject. In my opinion, there is no foundation for the contention that the Legislature, in 1872, intended to revive and introduce into this country the archaic rule prevalent in England in the days of Lord Coke. Section 116 does not, by its very terms, affect the present case. That section merely provides that during the continuance of the tenancy, a tenant of an immovable property or persons claiming through such tenant, cannot be permitted to deny that the landlord of such tenant at the beginning of such tenancy had no title to the immovable property. This does not imply that after the expiration of the tenancy, the tenant is free to dispute the title of the landlord. There is no conceivable reason, why we should read into the section such an implication; if the Legislature had intended to lay down the rule indicated by the respondent, the section might easily have been differently framed. Besides, as laid down in *The Ganges Manufacturing Co. v. Sourujmull* (9), and *Rup Chand Ghose v. Sarbessur Chandra Chunder* (10), sections 115 and 116 of the Indian Evidence Act are not exhaustive and there may be rules of estoppel applicable other than what is contained in those sections. Reference was finally made to the decisions in *Ammu v. Ramakishna Sastri* (11) and *Subbaraya v. Krishnappa* (12) which are clearly distinguishable, as they merely affirm

(1) (1863) Marshall 377.

(3) (1866) B. L. R. Sup. Vol. 588.

(5) (1870) 14 W. R. 85.

(7) (1905) I. L. R. 28 Mad. 526.

(9) (1880) I. L. R. 5 Calc. 669 (670).

(11) (1879) I. L. R. 2 Mad. 226.

(2) (1871) 8 Bom. H. C. R. 175.

(4) (1867) 7 W. R. 25.

(6) (1869) 7 B. L. R. 723 Foot-note.

(8) (1909) I. L. R. 34 Bom. 329.

(10) (1906) 10 C. W. N. 747.

(12) (1888) I. L. R. 12 Mad. 422.

the principle that a tenant is not estopped, either before or after the expiration of the term, from showing that the title of his lessor had determined. In the case before us, the defence is not that the title of the lessor had determined, but that the lessor had no title at the time the lease was granted. This defence was clearly not available to the defendant so long as he retained the possession which he had obtained by permission of the plaintiff.

I agree, on these grounds, that this appeal must be allowed, and a decree made in the terms proposed by the Chief Justice.

A. N. R. C.

Appeal allowed.

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Before Sir Ashutosh Mookerjee, Knight, Judge, and Mr. Justice Roe.

KALIM SHEIKH

v.

MOCHAM MANDAL.*

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1915.
May, 27.

Rent, suit for—Sale of portion of occupancy holding—Lease from purchaser taken by original raiyat—Landlord, right of—Settlement by landlord of the holding—Settlement-holder's right as against the original tenant—Estoppel.

A sale of a portion of an occupancy holding does not cause a forfeiture of the tenancy.

Dayamoyi v. Ananda (1) referred to.

So far as the landlord is concerned, the tenancy continues unaffected and he is entitled to look for payment of rent to his recorded tenant.

There is no abandonment of the holding, if the original tenant after parting with a portion of the holding remains in actual possession of it as an under-raiyat from the purchaser.

The disputed land belonged to A. In execution of a decree for money obtained against him, B purchased a portion of the holding. Thereupon the representative of the original tenant took subleases from the purchaser in respect of a portion only of the land acquired by him. The plaintiff took a settlement from the superior landlord of the disputed land which constituted the occupancy holding of A. He subsequently sued to eject B as a trespasser and obtained a decree against him. When he attempted to execute this decree, he was opposed by the defendant, the representative of the original tenant. The objection was allowed. The plaintiff then brought the present suit to recover rent from the defendant as his under-raiyat :

Held, that the relationship of landlord and tenant between the plaintiff and the defendant did not subsist and the claim for rent was not maintainable.

* Appeals from Appellate Decrees Nos. 3550 and 4140 of 1913, against the decisions of Babu Annada Kumar Sen, Subordinate Judge of Mymensingh, dated the 5th June 1913, reversing those of Babu Kedar Nath Chaudhuri, Munsiff of Mymensingh, dated the 29th April, 1912.

(1) (1914) I. L. R. 42 Calc. 172 (224); 20 C. L. J. 52 (90) F. B.

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That the original tenancy still continued and the landlord was not competent to create a valid occupancy holding in favour of the plaintiff.

That the defendant was not estopped from questioning the title of the plaintiff.

Appeals by the Defendant.

Suit for rent.

The material facts and argument appear from the judgment.

Babu Mahendra Nath Roy for the Appellants.

Babus Kali Kinkar Chuckerbutty and *Gopal Chunder Chuckerbutty* for the Respondents.

The judgment of the Court was delivered by

May, 27.

Mookerjee J.—This is an appeal by the defendant in a suit for rent. The land in dispute originally belonged to one Golak Sheikh. In execution of a decree for money obtained against him one Kissen Singh purchased a portion of the holding on the 23rd March, 1904. Thereupon the representative of the original tenant took subleases from the purchaser in respect of a portion only of the land acquired by him, under two leases dated the 14th and 19th February, 1905. On the 7th July, 1906, the plaintiff took a settlement from the superior landlord of the disputed land which constituted the occupancy holding of Golak Sheikh. He subsequently sued to eject Kissen Singh as a trespasser and obtained a decree against him on the 14th February, 1908. When he attempted to execute this decree, he was opposed by the present defendant, the representative of the original tenant, who was still in occupation of the land. The result was a proceeding under rule 100 of order 21 of the Civil Procedure Code, which terminated in favour of the objector on the 25th May, 1909. This suit was instituted on the 20th September, 1911, to enable the plaintiff to recover rent from the defendant as his under-ryot. The defendant resists the claim on the ground that the plaintiff has acquired no valid title under his settlement from the superior landlord and that, in the events which have happened, the occupancy holding still belongs to him as the representative of the original tenant. The Court of first instance dismissed the suit. Upon appeal the Subordinate Judge has reversed that decision. On the present appeal the decree of the Subordinate Judge has been assailed on two grounds; namely, *first*, that the plaintiff has acquired no valid title under his settlement from the superior landlord; and *secondly*, that the suit is barred by limitation under Art 11 of the schedule to the Indian Limitation Act.

As regards the first question, it is clear that the plaintiff cannot

possibly succeed. The effect of the purchase, by Kissen Singh, of a portion of the occupancy holding of Golak Sheikh did not cause a forfeiture of the tenancy. This is settled by a long series of decision of this Court, [*Kabil v. Chunder Nath* (1) ; *Durga v. Doula* (2) ; *Gozaffur v. Dablish* (3)] and is now finally confirmed by a Full Bench in the case of *Dayamoyi v. Ananda Mohan Roy Chowdhury* (4). Notwithstanding the purchase of a portion of the holding, by Kissen Singh, the tenancy, so far as the superior landlord was concerned, continued unaffected, and he was entitled to look for payment of rent to his recorded tenant. There was also no abandonment in fact, because the representative of the original tenant has continued in actual occupation of the land. This is proved conclusively by the circumstance that when the plaintiff endeavoured to execute the decree for ejectment against Kissen Singh, he was opposed and opposed successfully by such representative. It follows that as the original tenancy, still continued, the landlord was not competent to create a valid occupancy holding in favour of the plaintiff by the settlement of the 7th July, 1906. It has been ingeniously argued, however, that the defendant is estopped to question the title of the plaintiff. The argument is that the defendant, after he had, on the 14th and 19th February, 1905, accepted leases from Kissen Singh could not have contested the title of the latter ; consequently he cannot question the title of the plaintiff. This argument is manifestly fallacious ; for let it be conceded that the defendant could not have contested the title of Kissen Singh ; but how does that avail the plaintiff ? The plaintiff does not claim through Kissen Singh. He has, on the other hand, successfully sued Kissen Singh as a trespasser ; he has obtained a decree for ejectment against him and has actually removed him from the land. He cannot now turn round and contend, that the same estoppel which might have been operative against defendant in favour of Kissen Singh operates in his own favour, though he does not acknowledge the title of Kissen Singh. We are of opinion that the defendant was competent to question, as he has successfully assailed, the alleged title of the plaintiff under the settlement from the landlord. Consequently there is no relationship of landlord and tenant between the plaintiff and the defendant, and the claim for rent is bound to fail.

In this view, it is not necessary to discuss the second question

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(1) (1892) I. L. R. 20 Calc. 590.

(2) (1894) 1 C. W. N. 160.

(3) (1896) 1 C. W. N. 162.

(4) (1914) I. L. R. 42 Calc. 172 (224) ; 20 C. L. J. 52.

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namely, whether the suit is barred under Art 11 of the schedule to the Indian Limitation Act. But it may be observed that the title which the defendant sets up is that of an occupancy raiyat and the only title which the plaintiff claims is also that of an occupancy raiyat ; consequently this must be deemed to have been the right set up in the proceeding under rule 100 of order 21 of the Code ; and the present suit for cancellation of that order should have been brought within one year from its date ; in this view, the suit is barred by limitation.

The true position is that if the plaintiff fails on the merits, his suit is also barred under Art 11 of the schedule to the Limitation Act ; if he succeeds on the merits, no question of limitation arises.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored with costs in all the Courts.

It is conceded that this judgment will govern the other appeal, (S. A. 4140 of 1913) which is also allowed with costs.

A. T. M.

Appeals allowed.

PRIVY COUNCIL.

PRESENT :—*Viscount Haldane, Lord Shaw, Sir John Edge and Mr. Ameer Ali.*

MAHANT RAM PARKASH DAS

v.

MAHANT ANAND DAS AND OTHERS.

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1916.

*February, 3, 7, 8,
9, 10, 14, 15, 16,
17 and March, 16.*

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Hindu Law—Religious Endowment—Muth or Asthal—Mahant—Succession—Custom—Property of the Muth—Disqualification by marriage—Abdication in favour of a disqualified person, effect of—Document appointing such a person—Trial Judge's finding on question of fact, value of.

The question as to who has the right to succeed to the office of Mahant depends, according to the well-known rule in India, not on the general customary law, but upon the custom and usage of the particular Asthal or Muth.

The whole assets of an Asthal or Muth are vested in the reigning Mahant as the owner in trust for the institution itself, and although large administrative powers are undoubtedly vested in him, the trust does exist and must be respected. The succession to him in such property follows with the succession to the office.

In a Bairagi Asthal a married man who prior to initiation as a Bairagi Chela

has not renounced his wife and family and has not conformed to the practice of celibacy, is incompetent to be Mahant of the Asthal, and the Mahant for the time being who knowingly abdicates in favour of such a person and appoints him as his successor, consents to a violation of the views and practice of asceticism and celibacy which it is his duty as the trustee-mahant to maintain and protect. Any document under which such an appointment is made is void and inoperative, and on the Court setting aside the appointment, the Mahantship does not revert to the relinquishing Mahant, but goes to the person entitled according to the custom of the institution to succeed him.

The origin, nature, objects, custom and practice of such religious institutions, and also the rights, privileges, duties and powers of a Mahant stated.

Mahant Rama Nooj Dass v. Mahant Debraj Dass (1); *Sammantha Pandara v. Sellappa Chetti* (2); *Greedharee Dass v. Nundokissore Dass* (3); *Rajah Muttu Ramlinga Setupati v. Perianayagum Pillai* (4); and *Rajah Vurmah Valia v. Ravi Vurmah Mutha* (5) referred to.

The Trial Judge found upon the evidence adduced that the allegation that the defendant was a married man had been established and that the plaintiff's case was true. This verdict was reversed by the High Court on appeal without stating sufficient grounds:

Held, that upon a question of fact, the verdict given by the Trial Judge who had the advantage of seeing and hearing the witnesses could not be lightly set aside, specially as that Judge was also presumably acquainted with the manners and customs of the people among whom the transaction was alleged to have occurred. *Held further*, upon an examination of the evidence, that this rule could not be departed from in the present instance.

Appeal from a judgment and decree of the High Court (Brett and Vincent, JJ.), at Calcutta (August 26, 1911) reversing a judgment and decree of the Court of the Subordinate Judge, Second Court, Mozufferpur, (June 16, 1909).

The suit giving rise to this appeal was instituted by the appellant to establish his title to the office and position of Mahant of Asthal Patepur, and to the properties appertaining thereto. He claimed to be the senior *chela* of the first respondent who had held the said Mahantship from 1866 to 1897 when he resigned the same. He also claimed that by the custom of the institution he was entitled as such senior *chela* to succeed to the Mahantship on the death or resignation of the first respondent. He alleged that the first respondent had by a will, dated the 24th June 1890, appointed the second respondent who was his brother's son to succeed him as Mahant, and by a deed, dated the 14th May 1897, had resigned the said

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(1) (1839) 6 S. D. A. Rep. (Beng.) 262 (268).

(2) (1879) I. L. R. 2 Mad. 175 (179). •

(3) (1867) 11 M. I. A. 405 (429).

(4) (1874) L. R. 1 I. A. 209, 228.

(5) (1876) L. R. 4 I. A. 76 (83); I. L. R. 1 Mad. 235.

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office and purported to have constituted the second respondent as his successor therein upon certain conditions, and had made over all the said properties to him ; that an ekrarnama, dated the 6th August 1904, had also been made between the respondents by which it was agreed that the third respondent who was the brother of the second respondent should succeed the latter in the said office, and that the said arrangements were invalid inasmuch as the second and third respondents were not *chelas* of the first respondent and not even Bairagis, and the second respondent being a married man with children and the third afflicted with leprosy, were both disqualified from holding the said office.

The respondents denied that the appellant was a *chela* of the first respondent. They also denied the custom alleged by the appellant and alleged that the true custom was that the *mahant* for the time being had the right to appoint any one of his Bairagi *chelas* to succeed him. They relied upon the said documents and contended that the appointment of the second respondent who was a Bairagi *chela* of the first respondent was a valid appointment.

The Subordinate Judge decreed the suit. He found that the appellant was the first respondent's senior *chela*, and the second respondent was a married man and had begotten children upon his wife after his initiation, and was therefore disqualified from holding the said office. He held that the said documents were void, that the custom was that the senior *chela* was entitled to succeed as alleged by the appellant provided that he was competent, and that as there was no charge of incompetency against the appellant, he was entitled to succeed the first respondent who had effectually relinquished the office of *mahant*.

On appeal the High Court dismissed the suit. The learned Judges who heard the appeal came to the conclusion that the appellant failed to prove that he was the first respondent's *chela*, that the evidence offered to prove that the second respondent was a married man was altogether inconclusive, that under the custom prevailing in the institution the reigning *mahant* had power to select any one of his *chelas* whom he thought most suitable for appointment as his successor, and that the appointment of the second respondent who was proved to be the first respondent's *chela*, was a valid appointment.

The plaintiff thereupon appealed to His Majesty in Council.

Dunne for the Appellant referred to the following decisions :
As to the origin and object of a Muth as an institution of a

religious character : *Sammantha Pandara v. Sellappa Chetti* (1). As to the evidence and mode of proof of custom as to succession : *Greedharee Doss v. Nundokissore Doss* (2) ; *Rajah Muttu Ramalinga Setupati v. Perianayagum Pillai* (3) ; *Rajah Vurmah Valia v. Ravi Vurmah Mutha* (4) ; *Janoki Devi v. Sri Gopal Acharjia* (5) ; *Genda Puri v. Chhatar Puri* (6) ; *Ramalinga Pillai v. Vythilingam Pillai* (7) ; *Mohunt Bhagaban Ramanuj Das v. Mohunt Roghunundun Ramanuj Das* (8) ; and *Sitapershad v. Thakurdas* (9).

[Lord Shaw referred to *Mohunt Rama Nooj Doss v. Mohunt Debraj Doss* (10).

Sir W. Girth and *Dube* for the Respondents.

The judgment of their Lordships was delivered by

Lord Shaw :—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 26th August, 1910, reversing a judgment and decree of the Second Subordinate Judge of Mozufferpore, dated the 16th June, 1909.

The question in the appeal has reference to the office and rights of a *mahant* of an *asthal*, known as the *Patepore Asthal*, in the district of Mozufferpore. There are rival claimants to this office in the person of the plaintiff and of the defendant No. 2. The defendant No. 1, Anand Das was the *mahant* of the *Patepore Asthal*. By written documents and by his actings he has, as will be afterwards found, abdicated. But in this litigation he supports the claim of defendant No. 2, in whose favour he has granted those deeds which will be hereafter referred to. The *asthal* is one of some importance, and is stated to have a revenue of 50,000 rupees a year.

An *asthal*, commonly known in Northern India as a *muth*, is an institution of a monastic nature. It is established for the service of a particular cult, the instruction in its tenets, and the observance of its rites. The followers of the cult and disciples in the institution are known as *chelas* ; the *chelas* are of two classes—celibate and non-celibate. In the *asthal* now being dealt with, the religious brethren were the *bairagi* or celibate *chelas* : the lay brethren were *girhast* or householder *chelas*. The *mahant* must, by the custom of the *muth*, be a *bairagi* or religious *chela*. The *mahant* is the head of the institution. He sits upon the *gaddi* ; he initiates candidates into the

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(1) (1879) I. L. R. 2 Mad. 175 (179).

(2) (1867) 11 M. I. A. 405(429, 431). (3) (1874) L. R. 1 I. A. 209 (228).

(4) (1876) L. R. 4 I. A. 76 (83) ; I. L. R. 1 Mad. 235.

(5) (1882) L. R. 10 I. A. 32 (38) ; I. L. R. 9 Calc. 766 ; 13 C. L. R. 30.

(6) (1886) L. R. 13 I. A. 100 (105) ; I. L. R. 9 All. 1.

(7) (1893) L. R. 20 I. A. 150 (154) ; I. L. R. 16 Mad. 490.

(8) (1895) L. R. 22 I. A. 94 ; I. L. R. 22 Calc. 843.

(9) (1879) 5 C. L. R. 73 (79).

(10) (1839) 6 S. D. A. Rep. (Beng.), 262 (268).

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mysteries of the cult ; he superintends the worship of the idol and the accustomed spiritual rites ; he manages the property of the institution ; he administers its affairs ; and the whole assets are vested in him as the owner thereof in trust for the institution itself. Upon his death or abdication he is succeeded by one of the *bairagi chelas*. These *bairagi chelas* are, as stated, celibates ; or if they have ever been married they must, prior to their initiation as *bairagi chelas*, have renounced their wives and families and have conformed to the practice of the *muth*. This practice is ascetic : it involves a separation from all worldly wealth and ties, and a self-dedication to the services and rites of the *asthal*. (See, e.g., *Wilson's Religious Sects of the Hindus*, pp. 51, &c.)

"Pious persons endow the schools with property, which is vested in the preceptor for the time being, and a home for the school is erected and a *mattam* constituted." *Sammantha Pandara v Sellappa Chetti* (1).

It is, however, the rule that this property is held by the *mahant* as its owner, and the succession to him in such property follows with the succession to the office. The nature of the ownership is, as has been said, an ownership in trust for the *muth* or institution itself, and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning *mahant*, this trust does exist, and that it must be respected.

The question as to who has the right and office of *mahant* is one, in their Lordships' opinion, which, according to the well-known rule in India, must depend upon the custom and usage of the particular *muth* or *asthal*. Such questions in India are not settled by an appeal to general customary law ; the usage of the particular *muth* stands as the law therefor.

It appears [*Mahant Rama Nooj Doss v. Mahant Debraj Doss* (2)] that the *muths* are—

"Of three descriptions, namely, *mouroosi*, *punchaiti*, and *hakimi*, that in the first the office of chief *mahant* was hereditary, and devolved upon the chief disciple of the existing *mahant*, who, moreover, usually nominated him as his successor ; that in the second the office was elective, the presiding *mahant* being selected by an assembly of *mahants* ; and that in the third the appointment of presiding *mahant* was vested in the ruling power" (presumably the civil power), "or in the party who endowed the temple."

The case cited was interesting, and the report proceeds :

"Mr. Money then directed the *pundit* of the Sudder Dewanny

Adawlut to state what was the law of the *shastre* in regard to the appointment of a presiding *mahant* of a *muth* or temple called '*mouroosi*'; whether the principal disciple of the last *mahant* should succeed, or whether the existing *mahant* was competent to appoint whom he pleased from among the body of his disciples ?

"The reply of the *pundit* was as follows : 'Under the circumstances stated in the question, the principal *chela* or pupil is entitled to succeed on the death of the presiding *mahant* of a *mouroosi*, or hereditary *muth*. If the principal pupil be personally unfit to succeed, or be disqualified by any of those causes which, according to the *shastre*, are sufficient for such disqualification, then in that case the presiding *mahant* should, during his lifetime, select one properly qualified from among his pupils to succeed him. The person so selected will succeed.' "

Alongside of this report should be placed the view of Sir Charles Turner in *Sammantha Pandara v. Sellappa Chetti* (1) to this effect :—

"The preceptor, the head of the institution, selects among the affiliated disciples him whom he deems the most competent, and in his own life-time instals the disciple so selected as his successor, not uncommonly with some ceremonies. After the death of the preceptor the disciple so chosen is installed in the *gaddi*, and takes by succession the property which has been held by his predecessor."

Their Lordships are of opinion that the language last quoted cannot be taken in any sense as a statement of the general law of India. Any contention to that effect would indeed not be in accordance with Sir Charles Turner's own views, he having made this plain in the succeeding passage of his judgment:—

"We do not, of course, mean to lay down," said he, "that the property may not in some cases be held on different conditions and subject to different incidents."

It in short may rank as one of the varieties of circumstance and tenure whose adoption or rejection will fall to be determined by the usage and custom of the *muth*.

That this forms the controlling rule with regard to the right to the office of *mahant* may now be considered as having been conclusively settled by authority. In *Greedharee Doss v. Nundokisore Doss* (2), Lord Romilly so put it, observing "that the only law of these *muhants* and their offices, functions, and duties is to be found in custom and practice, which is proved by testimony." More recent authorities, such as *Muttu Ramalinga v. Periyayanayagam* (3) and

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(1) (1879) I. L. R. 2 Mad. 175 (179). (2) (1867) 11 M. L. A. 405 (428)¹

(3) (1874) L. R. 1 I. A. 209 (228).

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Vurmah Valia v. Vurmah Mutha (1), confirm this proposition, with the explanation which their Lordships think it right here to repeat, given by Sir Barnes Peacock as Chief Justice of Bengal, and cited with approval in the case last mentioned to the following effect:—

“Numerous cases have been cited to show what was the usage, but the law to be laid down by this Court must be as to what is the usage of each *mahantee*. We apprehend that if a person endows a college or religious institution, the endower has a right to lay down the rule of succession; but when no such rule has been laid down, it must be proved by evidence what is the usage, in order to carry out the intention of the original endower. Each case must be governed by the usage of the particular *mahantee*.”

As between the rival claimants to this mahantship the situation is as follows: The plaintiff maintains the broad proposition that according to the custom of this *muth* the succession falls to the eldest or senior (that is, earliest inducted) *bairagi chela*; that it so falls as of right; and that this right of succession cannot be defeated by any deed or deeds executed by the reigning *mahant*. If this be correct there is an end to the claim, so it is maintained, of defendant No. 2.

Upon the other hand defendant No. 2 maintains that there is no such absolute right of succession; that there are deeds in existence under the hand of Anand Das, the then reigning *mahant*, which transfer to and vest in him, the second defendant, the mahantship; and that, the question of succession being thus settled, the defendant No. 2 is now in office under a right—which is not defeasible by any right in the plaintiff as alleged senior *chela*.

Their Lordships have considered deeds executed by predecessors of the parties in the years 1832, 1854, and 1866 respectively. As between the propositions (1) that the choice of the reigning *mahant* must prevail, and (2) that the right of the senior *bairagi chela* must prevail, their Lordships are not prepared to affirm that either proposition is upon those deeds made out. In the first place, language, apparently of selection, is used; but in the second place, the person selected is in each case the senior *bairagi chela* for the time being. And there is in the evidence an apparent admission of the right of the senior *chela* to the office. Lastly, there is no instance given either in the documentary or oral evidence of a senior *chela* having been superseded by virtue of the selection of another by the *mahant* for the time being. In the view taken by their Lordships it is unnecessary to come in this case to a decision upon this issue.

For, in their Lordships' opinion, such an issue is superseded by issues of fact. Those issues are of undoubted difficulty. They are the subject of extreme conflict of testimony. The number and width of the topics in dispute are rare even in questions of disputed fact coming from India. These topics may, however, be conveniently ranged in two divisions.

The first question is whether defendant No. 2, the nominee of Anand Das under the deeds now to be mentioned, is competent to be *mahant* of this *asthal*. This competency is challenged : if the challenge be sound he cannot succeed.

The second question is, is the plaintiff a *bairagi chela* of this *muth*? His entire life history, vouched by himself and others, is challenged as a tissue of falsehood. If this challenge be sound the plaintiff cannot succeed.

What would happen if both of these challenges were sound or both were unsound their Lordships need not consider, as they have come to a definite conclusion that the one challenge succeeds and the other fails.

Before, however, the investigation is entered upon, it may be convenient and proper that the following general observation should be made. Their Lordships have had the duty, in view of the reversal of the judgment of Subordinate Judge by the High Court, of considering for themselves the entire body of the evidence in the case. They desire to record that in their opinion the Subordinate Judge has dealt with this complex and onerous case with much care, and that, although they differ from him in one or two particulars, his conclusions appear to the Board to be stated with clearness and with cogency ; and they think it right also to say that there does not appear to be any ground for the reflection made in the judgment of the High Court that the Subordinate Judge has displayed in any portion of his judgment, or has been in any particular moved by, either partiality or bias.

Upon the first question, the objection taken to Ram Partab Singh, the second defendant, is that he is a married man, the father of a son and daughter, one at least of these children having been born since he became, or is alleged to have become, *mahant*.

This enquiry into the domestic relations of the second defendant is of course on an issue which is fundamental. For the proposition cannot be denied that, even upon the assumption that a right of selection did exist on the part of the *mahant* as among the *bairagi chelas*, the nomination must fall upon one who is competent to hold his important sacred office. For instance, the person chosen may

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be disqualified by reason of bodily deformity, of bodily disease such as leprosy, of disease of the mind, or of the leading of a life which is immoral or is inconsistent with the religious vows of the brotherhood. In all such cases the nomination would be void.

Among these disqualifications stands the contracting of marriage and the begetting of children. As already mentioned, initiation of a married man must be preceded by the entire and permanent separation from his wife and by the giving up of all worldly ties. On the question of marriage, which will afterwards be considered in this case, it is no part of the respondents' case that defendant No. 2 was once married, but had relinquished those ties. The dispute of fact to be afterwards investigated is upon the broad question of whether he ever was, or, indeed, is now, a married man or the father of children.

If this question be answered in the affirmative, disqualification attaches to that defendant; he can never be *mahant*. And the deeds appointing him to that office or giving him any administrative rights, present or prospective, with regard to the mahantship are void.

Was Ram Partab Singh a married man and the father of children?

No registers of marriages can be appealed to. The evidence given in the case is that of the plaintiff, who attended the marriage ceremony, which he describes; of Kishen Das, who also gave evidence to this effect; and of Sitabullah Das, the *mahant* of a neighbouring *asthal* of Chainpara, who lent elephants and horses for the marriage procession. There is also the evidence of other witnesses, one of whom, Ajodhya, speaks to the defendant No. 2 having a wife, a son, and a daughter, and swears to having seen his son some four or five years ago. There is some other evidence of a similar description. In short, if the case stood at that point, the fact of the marriage and of the existence of the wife and son and daughter would be beyond question.

Their Lordships think it necessary to advert to this further point, which is of wide significance in regard to more than the present issue. The case for the plaintiff on this topic, as on nearly all others, is stated in the evidence with complete particularity, a particularity achieved in many instances in the course of an extended and meticulous cross-examination. The date of the marriage, for instance, is given; the name of the family into which defendant No. 2 married, and of his father-in-law, together with his residence and the present residence of wife and children, all are frankly given.

It is further mentioned that the ceremonial of marriage was the cause of expense to Anand Das, defendant No. 1, the then reigning *mahant*. Defendant No. 2, Ram Partab, was his nephew. All expenses were entered in the books of the *asthal*, and this expense would there appear. Furthermore, in a criminal case, to which reference will afterwards be made, it is alleged that Haman Lal, who knew the circumstance, made a statement on oath that defendant No. 2 was married. The magistrate who tried that case stated in his judgment that an admission of the marriage was made in the course of it. An offer was made in the present case to produce a copy of the statement of Haman Lal, and that was resisted. Their Lordships are of opinion that the note of the admission made to the magistrate in the criminal case was rightly rejected as by itself evidence of the fact recorded therein, and also that the objection of defendant No. 2 to the production of a copy of the evidence of Haman Lal was justified in law. But the peculiarity of the case is this : Haman Lal was in Court while all this was going on ; he was acting as a legal representative of the defendants ; and he was not called by them to clear up the matter, or to deny that he made the statement alleged or to explain it. Their Lordships are not surprised that that circumstance should have made a deep impression upon the mind of the Subordinate Judge as to where the truth upon this issue of fact really lay.

The counter-case is that the whole of this story of the defendant No. 2's being a married man and the father of two children is a pure invention. The extraordinary circumstance is that, although places, events, and people have been named so openly and in such detail, and although the cross-examination on behalf of the defendants has in many instances elicited overwhelming materials for exposing the falsehoods, if they were falsehoods, none of these materials were taken advantage of, and no such exposure is attempted. No witnesses were brought from the village named to say that defendant No. 2's wife and children do not live there. Her father, who had been openly named in the plaintiff's evidence, is not cited. In short, the details elicited at great length in cross-examination of the plaintiff for the purpose of testing his evidence are left just as he has placed them, without the people whose names are put to him being brought forward to contradict in any particular the statements that he has made. To this case the answer made by defendant No. 2 is : " My father-in-law ! my wife ! my children ! no such persons exist." And the case is left there.

As to the books, they have not been produced for any period

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which is critical in this case. It is admitted that the manager of the *asthal*, Raghunath, was responsible for their custody and accuracy. Had they been produced the absence of entries in them would, if the defendants' case be true, have completely confounded the plaintiff's allegations. The story which Raghunath gives as to the books is, in their Lordships' opinion, very unsatisfactory. He says that they were destroyed or taken away by one Kamal Sahai Dewan. He assigns no possible motive for such an act ; Kamal is available as a witness, and is not called.

Their Lordships do not go further into the evidence upon this subject, except to say that in face of the fact that conclusive evidence upon material particulars with regard to this issue having been available to the defendants and not led, their Lordships are not prepared to accept in lieu thereof general statements of belief on the part of other witnesses to the effect that, so far as they know, the defendant No. 2 is not a married man, and that his conduct in representing himself and acting as *mahant* proves that he is not disqualified.

Finally, upon this head their Lordships think it right to observe that upon a question of fact such as is now being investigated, the verdict given by the Subordinate Judge, who had the advantage of seeing and hearing the witnesses, cannot be lightly set aside, especially as that Judge was also presumably acquainted with the manners and customs of the people among whom such a transaction was alleged to have occurred. They must further remark that they see no sufficient grounds stated by the High Court for disturbing the verdict come to ; having themselves investigated the facts, they are of opinion that the rule which applies—of attaching weight to the opinion of the Judge of first instance—cannot with safety be departed from in the present instance.

The result of this portion of the case is fatal to the claim of defendant No. 2. He cannot be *mahant*.

He was the nephew of Anand Das, the reigning *mahant*, who was apparently determined to favour him. By a will dated the 24th June, 1890, he appointed this nephew to succeed him. By a deed dated the 14th May, 1897, he resigned the office, and constituted the second respondent as his successor. And by an *ekrarnama* dated the 6th August, 1904, it was agreed between the uncle and nephew that the third respondent, another nephew and brother of the second respondent, should succeed the latter in the office of *mahant*. All these deeds, for the reason stated, are unavailing, and must be set aside.

The deeds were in themselves, it may be added, of a peculiar character. The will stated that Ram Partab Das was senior *chela* and *inter alia* was competent to "perform the Sheva of Takurji." The *mahant* seven years afterwards, namely in 1897, transferred the absolute ownership of the *asthal* and all the properties and goods thereof to Ram Partab, the nephew, as *mahant*, but with the reservation to Anand Das, the grantor, of an annuity of 12,000 rupees per annum, and with a declaration that Ram Partab should have—"no right or power to do anything without my advice and consultation with me, and shall keep himself under my governance and power in respect to the management of every form relating to the *asthal*;" while the closing paragraph declared—"that without my consent and sanction he shall not be competent to appoint any of his *chelas* as *mahant*." The *ekrarnama* seven years later, namely in 1904, went a step further. The effect of this deed was that Ram Partab was to pay Anand Das—"any amount of money which at any time I, the first party, may require for personal expenses." Then occurs a clause to this effect—"As I, the second party, generally keep unwell, therefore I, the first party, with consent of the second party, have permitted the third party (another nephew) to perform the *sradh* of me, the first party."

The meaning of this is that whereas according to law and custom the successor in the mahantship performs the religious rites attending the obsequies of his predecessor, an arrangement was come to by which this was avoided, and that vital rite was, so to speak, handed on past the second defendant and confided to his brother, the third defendant. Whether such a transaction with regard to a mahantship in India be competent and possible need not be determined, as in their Lordships' opinion the whole deeds are void, in consequence of the disability by marriage of the second defendant, Ram Partab. It is not unworthy of remark, however, that the fact of the marriage of Ram Partab, and of this being known to Anand Das, might afford the only reasonable explanation yet offered for passing over Ram Partab, seeing that the marriage of the latter would undoubtedly have incapacitated him from performing the obsequies of his uncle. There is no evidence that Ram Partab's state of health was such as to create any incapacity. The inference, in short, is that the second defendant was married and the father of children, and that his uncle Anand Das knew it. It may be mentioned that the third defendant, it was admitted at the Bar, is dead.

The second question in the case is, accordingly, whether the plaintiff answers this description and is a *bairagi chela*. The deeds

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founded on by the defendants having been declared invalid, and the second defendant being incompetent to hold office, there is no dispute that the eldest or senior *chela* must succeed to the mahantship.

The plaintiff narrates the material circumstances of his life history in his own evidence. As the Subordinate Judge observes—"he has been cross-examined very severely for several days, and he was asked questions relating to the minutest details of the *asthal* and its people and he has acquitted himself very creditably. He knows all the *bairagis* and servants of the *asthal*; he knows every creek and corner of the *asthal* building; he describes the room of the *asthal* in which he used to live. He names the *mahants* of other *asthals*, as well as their *chelas*. He mentions the *bandaras* he attended with the defendant No. 1."

Their Lordships agree with the Subordinate Judge that no explanation has been given of the intimacy and unquestionable accuracy of the plaintiff with people, events, and affairs of the *asthal*, except upon the footing that he was initiated as one of the *chelas* thereof.

The details are briefly these. When he was about 10 years of age, the plaintiff went to bathe in the Ganges with his aunt and some women of his caste. The Ganges was only a distance of 6 or 8 miles from his native village. The story is that Anand Das had pitched his tent close to the river, and that the boy, after hearing the ringing of the bell, went and saw the idol which Anand Das had taken with him, and was asked by Lachmi Das whether he would become a *bairagi*, and that he agreed and stayed on. He was in poor circumstances, and it was a rich *asthal* into which he was to be initiated. His father a year afterwards came to the *asthal* and made enquiries, and consented to his continuing there. His initiation took place on the 4th April, 1884. He remained at the *muth* till 1885. Being then 15 years of age, he was sent to Ajodhya. In Ajodhya he received an education fitted to qualify him for his position as *bairagi chela*, including instruction in the Sanskrit language. He returned to the *muth* in 1897. In the meantime he had paid occasional visits to the *mahant* Anand Das, who had made payments of the sums required for his upbringing, all of which payments would, in the ordinary course, appear in the books of the *asthal*. From 1897 he remained in the *asthal* until the year 1904. In that year he was asked to sign as a witness the *ekvarnama*, which was the last of the series of documents above referred to, and under which defendant No. 2 had the mahantship confirmed to him

by Anand Das, his uncle, but under the peculiar reservations and conditions already referred to, and with, so to speak, a destination over in favour of his brother, the late defendant No. 3. This was the first deed, apparently, to which the plaintiff's signature had been required.

It is beyond question that after the initiation of the plaintiff, and under what influences is not known the defendant No. 1, Anand Das, made the resolve to attempt to bring his nephew or nephews into the succession to the mahantship, and that he was not deterred from this scheme even after he was aware that the defendant No. 2, Ram Partab, was married. The plaintiff, however, stood in the way of this scheme, and if his signature could be obtained as witness to the *ekrarnama*, this might have gone some way to the defeat of the plaintiff's rights.

Whether this story be on all points correct will never be ascertained; but this at least is true, that in 1904, just about the time when the *ekrarnama* founded on the present case was in fact, executed, the plaintiff brought a criminal suit in respect of the assaults committed upon him on the occasion of his expulsion from the Patepur *asthal*, and the reason assigned by him for having been assaulted was the failure to sign an *ekrarnama* as a witness. The plaintiff succeeded before the magistrate, and a conviction followed which was quashed on appeal. Their Lordships do not think these proceedings to be relevant in this case. The one important fact is that they were taken on a ground which is referable to the execution of an *ekrarnama*, and they were taken by the plaintiff as a claimant to be a resident as of right in the *asthal*, from which he had been expelled. It should be added that the plaintiff's account of his expulsion includes this—that he was deprived of the possession of his books and papers, including all the letters received by him from Anand Das, the *mahant*, while he, the plaintiff, was absent receiving education at Ajodhya.

By accident there have, however, been found two postcards, which are produced in this case. It is not seriously contended that these postcards are forgeries. In their Lordships' opinion they are of importance. The first is dated the 6th August, 1902, and is from Sukh Deo Das to the plaintiff addressed thus: "To Ram Parkash Das self," and the address is given, "Asthan Patepur, Thana Patepur, District Mozufferpur." The official post office stamps are: (1) "Rajnagar 6th August, 1902"; (2) "Mahuwa, 8th August, 1902": and (3) "Patepur B., 9th August, 1902." In this Sukh Das writes to the plaintiff:—

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"I had told you that I would write to you in case the Chandrika (a treatise on Sanskrit grammar) was being taught."

The second postcard is from Ambar Janardan Dasji to the plaintiff, Ram Parkash Das, and to Shyam Sundhar Dasji. It is dated the 14th October, 1901. The address of Ram Parkash Das is given as "The Asthan P. O. and Thana of Patepur." There are several postmarks, one of which is "Patepur." The document asks :—

"Are you prosecuting your studies or are you not? Is Shyam Sundhar Das prosecuting his studies or not?"

This accordingly is evidence tending to show that the plaintiff had studied in Ajodhya; that he was known to have proceeded thence to the Patepur *asthal*, and that it was in that *asthal* that he had his postal address. The whole of this is inconsistent with the case of the defendants, which is a complete denial of the entire story told by the plaintiff or of the fact that he at any time was a resident either by right or otherwise, in the Patepur *asthal*.

On this part of the case one thing is extremely suggestive,—namely, that the later postcard was addressed jointly to the plaintiff and Shyam Sundhar Dasji. This *chela* was in point of fact living at the *asthal* at the time the evidence in the present suit was being taken and "for the last ten or twelve years." He was, therefore, completely at the call of the defendants and although weeks elapsed between the time when the plaintiff gave his evidence and they were called upon to give theirs, Shyam Sundhar Dasji was not produced as a witness. It must, in their Lordships' opinion, be taken that, slender as this documentary evidence is, it and the circumstance of the not calling of Shyam Sundhar strongly support the case of the plaintiff and strongly rebut that of the defendants.

But the failure in the matter of evidence on the part of the defendants does not rest there; as in the case of the marriage of the defendant No. 2, so in the case of the life history of the plaintiff, the fullest details are given, many of the points being elicited by the cross-examination on behalf of the defendants. In particular the plaintiff describes his own relations, stating that his father was alive and where he resides, and with regard to the various places visited season after season by the plaintiff, materials are piled up by which his story, if inaccurate, could have been confounded. It is, however left without an attempt to do so having been made.

On this branch of the case also the evidence of the plaintiff is believed by the Subordinate Judge. It is supported by the evidence of Sitabullah, a neighbouring *mahant*, who swears that Anand Das initiated the plaintiff in his presence; and by that of Balkrishna Das.

Both of these witnesses are also believed by the Subordinate Judge. With regard to the former no motive whatever can be suggested for his having perjured himself ; and the allegation as to his having asked a thousand rupees as a bribe from Raghunath Ja, the defendants' manager, is rightly treated by the Subordinate Judge as false. It was said by Raghunath that the request was made in the presence of Gobind Das, and Gobind Das is not examined.

As to Balkrishna, he is a hemp smoker, which is not uncommon, and he is a mendicant going from place to place according to the habits of *chelas* in that part of the world. The Subordinate Judge remarks on this topic that "the *bairagis*, it appears, are beggars no doubt, but those who are true to their cult have a regard for truth, and they cannot be easily bribed to give false evidence."

Whether this be correct or not, their Lordships do not see any grounds in the evidence given for declining to accept, as the Subordinate Judge did, the credibility of the witness.

In reviewing the evidence, the learned Judges of the High Court were greatly moved by the view which they took that the story of the circumstances under which the plaintiff was induced to attach himself to Anand Das in 1884 amounted to an allegation of kidnapping, and that the date stated for the initiation of the plaintiff would have clashed with a period of mourning for a relative of Anand Das. The date—it is many years ago—may have been erroneous by two days, and there is no reason why, if the case were false, a questionable date should have been named. The Board agrees with the conclusion of the Subordinate Judge on the point.

The Subordinate Judge dealt lightly with the allegation of kidnapping and in the course of his judgment made the observation that "people of other religious denominations are now and then heard of enticing away minor children from custody of their lawful guardians for making them converts of their own faith."

This observation was unnecessary. But their Lordships are surprised to find that the High Court deals with it as if it were an attack upon Christian missionaries, and they go so far as to say that "supposing them to be directed against Christian missionaries, they are not supported by a tittle of evidence, and, so far as our experience goes, they are absolutely false. In introducing them into his judgment, the Subordinate Judge does not appear to have exhibited an impartial frame of mind in treating the facts of this case."

Upon this their Lordships deem it right to observe that they think the supposition upon which this reflection proceeds to be strained, and the reflection to be uncalled for.

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They incline to the view that the error on these subjects may have moved the High Court to discount improperly the true weight of the evidence, and to overlook important elements in the case.

As an instance of what their Lordships mean, it may be mentioned that the post cards are not alluded to in the judgment of the High Court, nor is the non-production of Gobind Das as a witness, nor even of Haman Lal as a witness ; while, with regard to the non-production of the books, there are speculations made as to whether they would or would not have assisted in the solution of the problems arising in the case, but no due weight is attached to the serious fact that evidence, which might have concluded the case in one direction or another, and for the custody of which the defendants are responsible, has not been brought before the Court by them.

But the case of the defendants, which otherwise would have rested on a denial by themselves and been supported by nothing more substantial than negative evidence of *mahants*, many of whom lived a considerable distance from the Patepur *asthal*, to the effect that they did not know that the plaintiff was a *bairagi chela*, or in residence—that case is still more seriously weakened by the positive case which the defendants put forward. That positive case is as follows, namely, that the plaintiff was a *bairagi chela*, but that he did not belong to Patepur *asthal*. He belonged, so it is said, to a sub-*asthal* or sub-*mutth*, consisting of a small house on a small plot of ground in the neighbourhood of Patepur, which was a separate *asthal* and had for its *mahant* one Baliram. This was an issue of fact, which fell to be proved by the defendants, and they had the materials for doing so, and at first hand. Baliram had, so the argument went, two *bairagi chelas*—one was the plaintiff and another was Manmohan Das. Their Lordships must decline to accept any hearsay evidence upon this subject, and it is sufficient to say that Baliram and Manmohan, both alive and available, are not produced as witnesses in support of the case alleged for the defendants. It is a somewhat striking fact that in judgment of the High Court there is no reference made to this important incident.

Their Lordships think it unnecessary to investigate further the details of the evidence, being satisfied that upon it the conclusion come to by the Subordinate Judge cannot be successfully challenged, and that accordingly the plaintiff has established his position to be a *bairagi chela* of Patepur *asthal*.

He is also by admission, if this be so, the senior *chela*, if not the only *chela*, who is competent to fill the office of *mahant*.

Only one other question remains. It is this : Anand Das is still alive. The deeds which he granted, which purported to be a transfer during his life of the mahantship to his nephews, defendants Nos. 2 and 3, are unavailing, defendant No. 2 being disqualified for the office, and defendant No. 3 being dead. In these circumstances, does the mahantship not revert to Anand Das ? Anand Das is a man now nearing 80 years of age. He has for years relinquished the mahantship. Since at least 1897 he has retired from office, and has made over to defendant No. 2 all his duties together with the properties of the *asthal*. He has had a mutation of names effected in the Collector's Register in respect of the villages belonging to the *muth*. He has thus abdicated all his functions, and, as he admits, his position is no more than that of any other worshipper. The *mahant*, in their Lordships' opinion, is not only a spiritual preceptor, but also a trustee in respect of the *asthal* over which he presides. His installation of defendant No. 2 on the *gaddi*, and his own retirement from the mahantship, would thus appear to have created a vacancy in the office.

But a more serious difficulty also arises from the fact that their Lordships cannot acquit defendant No. 1 of having been a party to deeds, and especially to the *ekrarnama* of 1904, which were of a nature inconsistent with his duty and position as guardian of this religious institution. To confer the mahantship upon a relation who was a married man and the father of children was to consent to a violation in the person of the highest and most responsible officer, namely, the *mahant*, of those vows and practices of asceticism and celibacy which it was his duty as a trustee to maintain and protect. In these circumstances their Lordships must accept the abdication which occurred as a governing fact in the case. Further, it is not alleged that the senior *chela*, on whom even according to the defendants' case the succession would devolve in the absence of an appointment, is disqualified by any just cause from holding the office vacated by the old *mahant*. In these circumstances their Lordships think that the plaintiff is entitled to the declaration made in his favour by the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the decree of the High Court set aside with costs, and the decree of the Subordinate Judge restored.

The respondents will pay the costs of the appeal.

T. L. Wilson & Co.—Solicitors for the Appellant.

Barrow, Rodgers and Nevill—Solicitors for the Respondents.

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CRIMINAL REFERENCE.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Sheepshanks.*

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Criminal Procedure Code (Act V. of 1898), sections 4 (h), 195 (1) (b), 476—Indian Penal Code (Act XLV of 1860), section 211—False information to the Police—Sanction to prosecute, legality of.

No sanction to prosecute is necessary under section 195 (1) (b) of the Code of Criminal Procedure when a false charge has been made to the Police and has not been followed by a judicial investigation thereof by a Court.

Where, therefore, the complainant to the Police never applied to the Magistrate for investigation, nor did he impugn the correctness of the Police Report as to the falsity of the complaint nor did he pray that the person accused by him might be brought to trial, nor was he examined on oath by the Magistrate :

Held, that the order for sanction to prosecute him was bad, if it was deemed to have been granted under section 195 of the Code, inasmuch as there was no 'complaint' within the meaning of section 4 (h) of the Code, and the offence could not be said to have been committed in a proceeding in a Court.

Held further, that the order for prosecution could not also be sustained under section 476 of the Code, as that section must be read with section 195 and is consequently restricted by the limitations contained in clause (b) of the section and the alleged offence under section 211 Indian Penal Code was committed neither in Court nor brought under its notice in the course of a judicial proceeding.

Dharam Das v. King Emperor (1) and *Jadunandan v. King Emperor* (2) relied on.

Reference under section 438 of the Criminal Procedure Code.

Order for sanction to prosecute the complainant petitioner for an alleged offence under section 211, Indian Penal Code.

The material facts will appear from the following

ORDER OF THE COURT.

This is a reference under section 438, Criminal Procedure Code by the Additional Sessions Judge of Sylhet. On the 17th January, 1916, the petitioner laid a first information, under section 154 Criminal

* Criminal Reference No. 78 of 1916 (undefended) by J. H. A. Street Esq., Additional Sessions Judge, Sylhet dated the 17th May, 1916 against an order of Moulvi Tajammal Ali, Subdivisional Officer, Sylhet, dated the 5th April, 1916.

(1) (1908) 7 C. L. J. 373.

(2) (1909) 10 C. L. J. 564.

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Procedure Code, at the Maulavi Bazar Police Station against Karam Shaikh and others and alleged that they had stolen his paddy and had thereby committed a cognizable offence under section 379 Indian Penal Code. The Police investigated into the matter and on the 31st January submitted a final report under section 173, to the effect that the case appeared to be false and that there was no evidence for false prosecution. The Sub-Divisional Officer, on receipt of this report, passed an order on the 12th February in the following terms: "complainant to prove his case." It will be observed that the complainant had not applied to the Magistrate to investigate into the matter. On the 18th March the Magistrate examined four witnesses and ordered the Police "to adduce evidence on the 5th April to prove that the case was malicious." On the day fixed, six more witnesses were examined. The Magistrate then recorded the following order: "it is evident from their depositions that there is a party feeling in the village, but the witnesses examined by the complainant had suppressed it. The complainant has totally failed to prove his case. I declare the case to be maliciously false and dismiss it under section 203. I sanction the prosecution of the complainant Tayabullah under section 211 Indian Penal Code." The Sessions Judge has on the application of Tayabullah recommended that the order be set aside. It is plain that the order for sanction cannot be supported.

No sanction was required in this case under section 195 (1) (b). A sanction is requisite in respect of an offence under section 211 Indian Penal Code only when such offence has been committed in or in relation to any proceeding in any Court; no sanction is necessary when a false charge has been made to the Police and has not been followed by a Judicial investigation thereof by a Court: *Karim Buksh v. King Emperor* (1); *Bhimaraja v. Moova* (2); *Emperor v. Ahamed* (3). The position is different where, upon the Police report as to the falsity of the complaint, the complainant insists upon a judicial investigation; if he does so, he is deemed to have preferred a complaint to the Magistrate; if the Magistrate finds his case to be false, a sanction would be requisite under section 195 (1) (b), as the offence may be said to have been committed in a proceeding in a Court: *Queen v. Shamlall* (4); *Jogendra Nath Mookerjee v. Emperor* (5); *Queen Empress v. Beari* (6). In the

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(1) (1905) P. L. R. 74, 2 Cr. L. J. 66, P. R. 12.

(2) (1912) 13 Cr. L. J. 480.

(3) (1911) 13 Cr. L. J. 578.

(4) (1887) I. L. R. 14 Calc. 707.

(5) (1905) 2 C. L. J. 228; I. L. R. 33 Cal. 1.

(6) (1886) I. L. R. 10 Mad. 232.

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case before us, the petitioner never applied to the Magistrate for investigation ; he did not impugn the correctness of the Police report nor did he pray that the persons accused by him might be brought to trial. He was never examined on oath by the Magistrate; he cannot by any stretch of language be deemed to have made a "complaint" under section 4 (h), and it is difficult to understand what the Magistrate meant when he dismissed the case under section 203. It is thus clear that the order for sanction to prosecute is bad, if it be deemed to have been granted under section 195. The order is equally bad, if we hold that the Magistrate has inaccurately expressed himself and that what he really intended was to make an order under section 476 (1). In the first place, as pointed out in *Dharamdas v. King Emperor* (1) and *Jadunandan v. King Emperor* (2), section 476 must be read with section 195 and is consequently restricted by the limitations contained in clause (b) of that section. An order for prosecution under section 476 cannot thus be made where the alleged offence under section 211 has been committed, not in Court but in relation to a Police investigation. In the second place, a Court is competent to take action under section 476, only when the alleged offence has been committed before it or brought under its notice in the course of a judicial proceeding. Here the alleged offence was not committed in Court ; nor was it brought to the notice of the Magistrate in the course of a judicial proceeding. The report by the Police was not under section 157, so as to entitle the Magistrate to proceed under section 159 ; the procedure he adopted is not contemplated by the Code. *Mouli Durzi v. Naurangilal* (3). There was thus no judicial proceeding before him, and he could not consequently have taken action under section 476. It follows accordingly that his order cannot be sustained, either under section 195 or under section 476. We must, therefore, accept the recommendation of the Sessions Judge and set aside the order of the 5th April 1916.

D. K. R.

Order set aside.

(1) (1908) 7 C. L. J. 373.

(2) (1909) 10 C. L. J. 564.

(3) (1900) 4 C. W. N. 351.

*Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice
Sheepshanks.*

JAYKRISHNA SAMANTA AND ANOTHER

v.

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Indian Penal Code, (Act XLV of 1860) section 504—Insult, ingredients essential for a conviction—Breach of peace, if actual, necessary—Criminal Procedure Code (Act V of 1898), section 438.

The ingredients essential for a conviction under section 504 of the Indian Penal Code are threefold, first, intentional insult, secondly, provocation therefrom, and, thirdly, intention that such provocation should cause, or knowledge that such provocation was likely to cause the person so insulted to break the public peace or to commit any other offence.

Insult may be inferred not merely from the words used, but also from the tone and manner in which the words are spoken.

The law makes punishable an insulting provocation which under ordinary circumstances would cause a breach of the peace to be committed, even though in the particular case the person insulted does not commit a breach of the peace.

Reference under section 438 of the Code of Criminal Procedure by the Sessions Judge of Bankura.

The two accused were charged with an offence under section 504 of the Indian Penal Code for insulting a Magistrate who was deputed on a local enquiry regarding the excavation of a well, and was convicted and sentenced to pay a fine of Rs. 75 each, on default to suffer rigorous imprisonment for one month by the Deputy Magistrate. The Sessions Judge made this reference recommending that the convictions and sentences be set aside.

The judgment of the Court was as follows :

This is a reference under section 438, Criminal Procedure Code, made by the Sessions Judge of Bankura at the instance of two persons who have been convicted by the Deputy Magistrate of Bankura under section 504 Indian Penal Code.

It appears that an application was made by the residents of village Chhatarkanali to the District Magistrate and Collector for funds to enable them to dig a well. On the 26th February, 1916, Maulavi Ahammad the Deputy Magistrate proceeded to the locality to enquire into the matter. He was respectfully received on arrival

* Criminal Reference No. 83 of 1916 (undefended) under section 438 of the Code of Criminal Procedure by C. Tindall Esq., Sessions Judge, Bankura, dated the 30th May 1916 against an order of L. B. Das Esq., Deputy Magistrate, Bankura, dated the 21st March, 1916.

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and was given a chair. In the course of the discussion which followed, he observed to some of the people gathered round him that as it would take 6 weeks to excavate a well, the drought would be over by that time. To this Jaykrishna Samanta, one of the accused, answered that it would take only 10 days and added that he was a P. W. D. Contractor at Ranchi. The Deputy Magistrate says that this was said in a "loud, excited, and angry tone" in fact, that the tone appeared to him to be "insolent." The discussion, however, proceeded, and the Deputy Magistrate later on observed that as some of the residents were well-to-do, they must make the well themselves. At this the two accused said, "তবে কেন enquiry করছ, চুপ করে থাক, চলে যাও." This is not very good Bengali, and the word "থাক" is obviously unmeaning in this context. The whole may be translated as follows: "Then why do you make an enquiry, go away quietly." The Deputy Magistrate says that he felt insulted and provoked by this; so, a week later, he preferred a complaint against the two persons before Mr. H. D. Mullick, the Sub-Divisional Officer, who directed the prosecution of Jaykrishna Samanta and Nagendranath Sao under section 504 Indian Penal Code. They were summarily tried by another Deputy Magistrate Mr. L. B. Das who convicted them and sentenced them to pay a fine of Rs. 75 each, on default to suffer rigorous imprisonment for one month. The Sessions Judge has recommended that the convictions and sentences be set aside. He adds that the petitioners have offered to build the well with Rs. 150 and have said that they intended no discourtesy; the District Magistrate is fully satisfied with this amende. We are of opinion that the conviction cannot be sustained.

Section 504 provides that whoever intentionally insults and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace or to commit any other offence, shall be punished with imprisonment or with fine or with both. The ingredients essential for a conviction under section 504 are consequently threefold, *first*, intentional insult, *secondly*, provocation therefrom, and, *thirdly*, intention that such provocation should cause or knowledge that such provocation was likely to cause, the person so insulted, to break the public peace or to commit any other offence. The term "insult" signifies, as stated in the Oxford Dictionary, "to treat with offensive disrespect, to offer indignity to." Such insult may be inferred not merely from the words used, but also from the tone and manner in which the words are spoken. Assume that the rudeness in this case amounted to an

insult ; Was it intentional, that is, done on purpose ? It is difficult to see why the accused should have, on purpose, offered an insult to the Deputy Magistrate. They were obviously, irritated at his attitude, and their disappointment was probably keen when they realised that Government aid would not be recommended. In the next place it is not every intentional insult which is criminally punishable ; it must be shown that the accused intended or knew it to be likely that the provocation would cause the Deputy Magistrate to break the public peace or to commit some other offence. Though the Deputy Magistrate in his evidence states that he felt provoked, he does not say that the provocation was of such a degree as was likely to lead to a breach of the peace. No doubt, the law makes punishable an insulting provocation which under ordinary circumstances would cause a breach of the peace to be committed, even though in the particular case the person insulted does not commit a breach of the peace ; but we are not able to hold that the rudeness on the part of the accused, such as it was, was either intended by them to lead to a breach of the peace or was known to them to be likely to lead to such breach or to the commission of some criminal Act. In our opinion, the elements necessary to sustain a conviction under section 504 have not been established. We are also of opinion that the salutary provisions of section 95, which, according to Stephen (History of Criminal Law, Vol. III, 307) might well be adopted even in the Law of England, completely covers the present case.

We accordingly accept the recommendation of the Sessions Judge, set aside the convictions and sentences and direct that the fines if paid, be refunded.

S. C. R. C.

Convictions set aside.

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CIVIL RULE.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir
Asutosh Mookerjee, Knight, Judge.*

NURI MIAN

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April, 28.
May, 10. 11,

v.

AMBICA SINGH AND ANOTHER. *

Pre-emption—Shafsee, rights of—Right of pre-emption not existing at the date of the decree by the trial Court, if enforceable—Events subsequent to institution of suit, if Court can take notice of—Review of judgment—Application based on a ground never taken before, maintainability of.

In a suit for pre-emption, the right of the plaintiff to get pre-emption must exist not only at the time of the sale, but also at the time of the institution of the suit, and finally upto and at the date of the decree.

Ram Gopal v. Piari Lal (1), *Tafazzul Husain v. Than Singh* (2) and *Sanwal Das v. Gur Parshad* (3) followed.

Per Mookerjee, J.—Ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution; but there are cases where it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit, and to mould its decree according to the circumstances as they stand at the time the decree is made. This principle will be applied where it is shown that the original relief claimed has by reason of subsequent change of circumstances become inappropriate, or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties.

Rai Charan Mandal v. Biswa Nath Mandal (4) referred to.

Where the ground assigned in support of an application for review raises a pure question of law and its determination does not depend upon the investigation of new facts, and the alleged error is apparent on the face of the record, the application for review will be entertained although the ground was not taken at any stage of the proceedings.

Connecticut Fire Insurance Company v. Kavanagh (5) relied on.

Appeal by the Defendant.

Plaintiff, Ambica Singh, brought a suit on the 8th October, 1912, to enforce his right of pre-emption under the Mahomedan Law in respect of shares of three villages sold on the 12th July, 1912, by his co-sharer, the second defendant, Bansidhar, to the first defendant Nuri Mian on the allegation that he had performed all the ceremonies required by law.

The learned Subordinate Judge dismissed the suit on the 16th

* Civil Rule (on Review) No. 326 of 1916, and appeal from Appellate Decree, No. 1107 of 1914, against the decision of G. Rowland Esq., District Judge of Saran, dated the 7th April, 1914, reversing the decision of Babu Charu Chandra Mukherjee, Subordinate Judge of Saran, dated the 16th January, 1914.

(1) (1899) I. L. R. 21 All. 441.

(2) (1910) I. L. R. 32 All. 567.

(3) (1908) 10 P. L. R. 561.

(4) (1914) 20 C. L. J. 107.

(5) (1892) A. C. 473.

January, 1914. On appeal the learned District Judge decreed the suit on the 7th April, 1914. Against that decision the defendant preferred a second appeal (Appeal from Appellate Decree No 110 of 1914) to the High Court, and the appeal was dismissed on the 19th January, 1916, by a Division Bench of the High Court (Sharfuddin and Roe JJ.)

It appears that the property in dispute was the subject of a proceeding for partition under the Estates Partition Act, instituted before the Collector on the 15th May, 1909, and completed on the 2nd December, 1913; and this matter was never pointed out to Court at any stage of the proceedings.

Defendant made an application for Review of judgment passed by the High Court, on the ground that the plaintiff ceased to be a co-sharer in the joint property on the 2nd December, 1913, and as such his right of pre-emption was extinguished, and consequently no decree for pre-emption could be made on the 16th January, 1914, or 7th April, 1914. A Rule was issued which was heard on the 28th April and 10th and 11th May, 1916.

Moulvis Khurshad Hussain and A. S. M. Akram for the Petitioner and Appellant.

Babu Sarat Chandra Roy Chowdhury for the Opposite party and Respondent.

The following judgments were delivered in Rule No. 326 :

Sanderson, C. J.—In this case the action was for pre-emption. The suit was dismissed by the Court of First Instance on the 16th of January 1914. But on appeal to the District Judge, that decision was reversed, and the District Judge decreed the suit, holding as a matter of fact that the ceremonies had been duly performed, that the defendant-purchaser was not a co-sharer and that the property was joint property at the time of the institution of the suit. From that, the defendant appealed to the High Court, and that appeal was dismissed by the two learned Judges who constituted the Bench on that occasion. Then a Rule was obtained by the defendant calling upon the plaintiff to show cause why that judgment should not be reviewed upon three grounds, the main ground being that the conditions which were necessary to give a right to the plaintiff to pre-emption did not exist at the date of the decree; and, that is the point which has been mainly argued, and if I may say so very well argued by the learned Vakil for the plaintiff on this occasion. In order to appreciate the point it is necessary to state three or four facts. One Bansidhar sold his interest in the property on the 12th of July 1912 to the first defendant whose name was Nuri Mian,

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and at that time there were partition proceedings pending. On the 8th of October 1912, the plaintiff instituted the present suit to assert his right of pre-emption. The partition proceedings were completed on the 2nd of December 1913, by reason of the issue of the notice under section 92 of Estates Partition Act. The first decree in this suit, as I have already mentioned, was on the 16th of January 1914, after the date when the partition proceedings were completed. In that decree, the defendants succeeded, and it was not until the 7th of April 1914, when the District Judge's decision was given that the plaintiff got his decree for pre-emption. I do not think it matters which of the dates is taken, whether the 16th of January 1914, or the 7th of April 1914, because both of them are subsequent to the 2nd of December 1913, when the partition proceedings were completed.

Now, the point taken by the learned Vakil on behalf of the defendants is that in such a case as this, namely, in a suit for pre-emption, the right of the plaintiff to get pre-emption must exist not only at the time of the sale, but also at the time of the institution of the suit, and finally up to and at the date of the decree. The principle is thus stated in Sir R. K. Wilson's Digest of Anglo-Mahomedan Law at page 400 :—"The co-sharership, 'participation in appendages,' or ownership of contiguous property, as the case may be,"—this being a case of co-sharership must not only exist at the time of the sale which gives rise to the claim of pre-emption, but must continue to exist down to the time when the suit is instituted, and (it seems) even down to the decree." Of course, that is not an authority, and I do not refer to it as an authority, but I only refer to it for the purpose of stating what is considered by the Text writers as the principle. The question remains whether that principle is right.

Now, both on the ground of principle and also by reason of the authorities to which Mr. Roy Chowdhury has very rightly drawn our attention, although some of them are in my opinion directly against him, I think this Rule must be made absolute. The principle, I think, cannot be better stated than it is, in the case of *Tafazzul Husain v. Than Singh* (1), where the judgment was given at page 570. That was a case in which partition proceedings had taken place, and at the time of the decree the property was no longer a joint property. The learned Judges said there, "We think that the decisions of the Courts below were correct. The plaintiff's right was based upon the fact that he was partner with the vendor. To quote Hamilton's translation of the Hedaya, *shafa* relates to a

(1) (1910) I. L. R. 32 All 567.

thing held in joint property and which had not been divided off. The right of *shafa* is founded on a precept of the Prophet who had said, "the right of *shafa* holds in a partner who has not divided off and taken separately his share." I pause there to say, that I think that is the principle which applies to this case; the plaintiff's right was based upon the fact that he was a partner with the vendor; at the time of the sale he was a partner with the vendor; at the time of the institution of the suit he was a partner with the vendor; but at the time the decree was made, in 1914, the joint property, had ceased to exist, for the property had been divided into different shares which had become the separate property of the individuals who were entitled to the shares under the partition proceedings: and, it seems to me it would be impossible to make a decree upon the basis upon which the plaintiff's claim was put forward in this action. Then the learned Judges went on to say, "Having regard to what has happened, the plaintiff's property has been divided off. He is no longer a partner with the vendor. It is argued that inasmuch as the plaintiff was a partner at the time of the institution of the suit, it therefore does not matter that a partition has since taken place, particularly if the plaintiff was not the person who sought partition. Evidently the plaintiff did feel that if he had prosecuted the partition, it would be fatal to his suit, and this perhaps explains why he withdrew from the application for partition which he himself made in the first instance. It is expressly laid down in the Hedaya, Chapter IV. Book 38, that it is a condition that the property of the *shafi* remain firm until the decree of the Oazi be passed; and for this reason if the *shafi* previous to the decree of the Oazi sell the house from which he derives his right of *shafa*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated. Applying the same principle to the present case, plaintiff's right of *shafa* was founded upon the fact that he was a partner, that is to say, a co-sharer in the *mahal*. He has ceased to be such co-sharer. Therefore the reasons or grounds of his right had been extinguished before the decree of the Court, and therefore the right itself is also extinguished." I think that those words apply directly to this case, and I propose to follow the decision in that case and also to say that in my judgment that decision is based upon sound reason and principle, and therefore, I think this Rule must be made absolute.

[The appeal No. 1107 of 1914 was reheard and the following Judgment was delivered:]

This is now to be taken as the hearing of the appeal, and I would like to say this about that matter to show that I have not overlooked

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the point taken by the learned Vakil for the plaintiff. It was clearly within our jurisdiction to hear the Rule, and the hearing of the appeal is a natural consequence, under the Rule as was mentioned by my learned brother Mr. Justice Mookerjee and of the fact that we made the Rule absolute. In my opinion, we have jurisdiction to hear it, but if there is any doubt about it, I give direction under the second proviso of clause 39 of the Letters Patent of the Patna High Court that this appeal should be heard in this Court.

With regard to the cost we have considered the matter carefully, and we think that the proper order to make is that the appeal will be allowed and the judgment of the Court of first instance by which the suit was dismissed will be restored. The plaintiff will pay the defendants' costs incurred in the Court of first instance and in the first appellate Court, but there will be no costs with regard to the proceedings in the High Court either with regard to the appeal or with regard to the Rule with the exception that we think that the plaintiff should pay the Court-fee which was paid on the memorandum of appeal, which we understand is Rs. 150.

The money deposited by the plaintiff will be returned to him.

Mookerjee, J.—I agree that this Rule issued on the application for review, which raises an important question of law of first impression, so far as this court is concerned, must be made absolute.

The plaintiff seeks to enforce his right of pre-emption under the Mahomedan law in respect of shares in three villages sold on the 12th July 1912 by his co-sharer, the second defendant, to the first defendant. He instituted this suit on the 8th October 1912 on the allegation that he had performed all the ceremonies requisite under the Mahomedan law. The Subordinate Judge dismissed the suit on the 16th January 1914. Upon appeal the District Judge gave the plaintiff a decree on the 7th April 1914. An appeal from the decree of the District Judge was dismissed by this Court (Sharfuddin and Roe JJ.) on the 19th January 1916 ; and this is the judgment we are now invited to review.

The ground on which the application for review is made was admittedly not taken at any stage of the proceedings, and it has been argued on behalf of the opposite party that the petitioner should not be allowed to base his application on a ground never taken before. In my opinion, there is no force in this contention. In the first place, as was pointed out by the Judicial Committee in the case of *Connecticut Fire Insurance Co. v. Kavanagh* (1) "when a question of law is raised for the first time in a court of last resort, upon the

construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the courts below." Here the ground assigned in support of the application for review raises a pure question of law, and its determination does not depend upon the investigation of new facts. In the second place, the alleged error, if it be an error, is apparent on the face of the record. The petitioner contends that the suit should not have been decreed, inasmuch as the right of pre-emption had been lost before the date of the decision of the Subordinate Judge in the court of first instance. This argument is based on admitted facts. The case was decided by the Subordinate Judge on the 16th January 1914. The District Judge made his decree on the 7th April 1914; that decree may, by a fiction be deemed to have been made as early as the 16th January 1914, inasmuch as the District Judge only made that decree which, in his opinion, should have been made by the trial Court. The property was the subject of a proceeding for partition under the Estates Partition Act, 1897, instituted before the Collector, on the 15th May 1909. The partition proceedings were completed on the 2nd September 1913; and consequently on that date, the subject matter of the litigation ceased to be joint property. The petitioner contends in essence that, as the plaintiff ceased to be a co-sharer in the joint property, on the 2nd September 1913, his right of pre-emption was extinguished on that date and consequently no decree for pre-emption could be made thereafter on the 16th January 1914. If this argument is well founded on principle, the error assigned is apparent on the face of the record. I hold accordingly that the application for review must be entertained and considered on its merits.

The substance of the argument for the petitioner is, that any person who seeks the assistance of a Court with a view to enforce a right of pre-emption, is bound to establish that the right existed at the date of the sale, at the date of the institution of the suit, and also at the date of the decree of the trial Court. In support of this contention, reliance has been placed upon the decisions in *Ram Gopal v. Peari Lal* (1) and *Tafazzul Husain v. Than Singh* (2). On behalf of the opposite party, the correctness of these decisions has been called in question and we have been invited to apply the

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rule that the decree in a suit should conform to the rights of the parties as they stood at the date of its institution. Now, it may be conceded that, ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But this principle is not of universal application and in a long series of decisions, which will be found reviewed in the case of *Rai Charan Mandal v. Biswa Nath Mandal* (1), the doctrine has been recognized that there are cases where it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. This principle will be applied where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. In my opinion, the case before us falls within this exception to the general rule, and the decree herein should be made in accordance with the circumstances as they stood at the date of the decree of the trial Court, because otherwise the decree, if made in conformity with the prayers in the plaint would be inappropriate and would not do complete justice between the parties. This may be well illustrated by a reference to the prayer in the plaint itself. The plaintiff seeks a declaration of his title to specified shares in the three villages mentioned in the schedule, and prays that he may be placed by the Court in possession of such shares. The decree of the District Judge is in strict conformity with these prayers in the plaint. But it has not been seriously disputed that the decree so awarded to the plaintiff is incapable of execution by reason of events which have happened since the institution of the suit. The joint property has, during the pendency of the litigation in the trial Court become transformed into several separate estates, and it is impossible, in execution of the decree awarded to the plaintiff, to place him in possession of a share in the joint property as claimed by him in the plaint. It was, indeed, faintly suggested on his behalf that the decree might be modified, so as to entitle him to recover possession of the allotment made in favour of the first defendant. The obvious answer is that such relief, if awarded, would be inconsistent with the prayer in the plaint, and with the fundamental notion of pre-emption which lies at the root of that prayer. This, then, is obviously a case where a decree cannot be made in favour of the

plaintiff in strict accord with the terms of the prayer in the plaint. The question, consequently, arises, what decree should be made in favour of the plaintiff; is he entitled to the specific relief claimed by him or to any substituted relief. In my opinion, the answer must be in the negative.

The true foundation of the right of pre-emption is explained in two passages in Book xxxviii of the Hedaya. The first of these passages is in these terms: "‘Shaffa’ in the language of the law signifies the becoming proprietor of lands sold for the price at which the purchaser has bought them, although he be not consenting thereunto. This is termed ‘shaffa’, because the root from which ‘shaffa’ is derived signifies conjunction and the lands sold are here conjoined to the land of the shaffee or person claiming the right of pre-emption." This indicates that the right of pre-emption is a right of substitution. The plaintiff complains that his co-sharer has transferred his share in the joint property to a stranger, and claims to be substituted in the place of the purchaser of the share of the joint property. If before this can be effected, the property ceases to be joint property, it is obvious that the foundation of the right of pre-emption disappears. This view is fortified by the second passage which is in these terms: "It is an express condition of Shaffa that a man be firmly possessed of the property from which he derives his right of Shaffa at the time when the subject of it is sold, a condition which does not hold on the part of his heirs." [The author here deals with a case where the person claiming the right of pre-emption has died before a decree is made in his favour by the Kazeer.] "It is moreover a condition that the *property of the Shaftee remain firm until the decree of the Kazeer be passed*; and, as this does not hold on the part of the deceased Shaffee, the Shaffee is therefore not established with respect to any one of his descendants, because of the failure of its conditions." It has not been seriously disputed by the plaintiff that the right of pre-emption, in order that it may be enforced by a Court, must not only arise on the sale, but be also existent at the date of the institution of the suit; for it is unquestionable upon the authorities that if a person, who claims a right of pre-emption, ceases to be interested in the joint property before the institution of the suit, he cannot obtain assistance from the Court. Consequently, the view cannot be maintained that the right of pre-emption which arises from the moment the sale is effected by the co-sharer, is enforceable as it stands at the time of its origin; it is liable to be extinguished by events subsequent. The only point of difference between the plaintiff and the defendant

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is, whether the point of time, with reference to which the existence of the right is to be determined, is the date of the institution of the suit or the date of the decree by the trial Court. In my opinion, for the reasons already assigned, it is plain that the right must exist and retain its enforceable character when the decree is made by the primary Court. This view was adopted in *Ram Gopal v. Piari Lal* (1) and *Tafazzul Hasain v. Than Singh* (2), these decisions are mentioned without dissent by well-known text writers, such as Amir Ali, Tyabji and Wilson. It is also worthy of note that the Chief Court of the Punjab has accepted the same view in *Sanwal Das v. Gur Parshad* (3), though a contrary view had been adopted in an earlier case : *Fais Baksh v. Ramjidas* (4). In the case just mentioned, which was decided by a Full Bench of eight Judges, the nature of the right of pre-emption was fully analyzed by Chief Justice Clark and Mr. Justice Chatterji. Mr. Justice Chatterji observes as follows : "A pre-emptor is bound to show that he was clothed with the right at the date of sale and also at the date of suit and up to the time of the final decree or should have his claim dismissed. If the pre-emptor loses his right within the period mentioned above, whether by his own act or from causes beyond his control, his suit fails. The pre-emptor cannot get a decree unless he maintains the right on which he sues to the end." Chief Justice Clark added that "conceding that the plaintiff pre-emptor must retain the prior right up to the time of institution of suit, and even up to decree, a plaintiff must have a subsisting cause of action up to the time of the decree. The possession of the property in which the right of pre-emption inheres is a part of his cause of action, and if he loses that property either voluntarily or involuntarily before decree, his suit must fail." This is obviously consistent with sound sense ; for if the contrary opinion were accepted, the result would follow that relief by way of pre-emption may be awarded to a person who, according to the altered circumstances as they exist at the date of the decree, can show no reason whatever why he should be placed in that position of advantage.

Accordingly I agree that this Rule must be made absolute, and the decree of this Court discharged. I also concur in the order which the Chief Justice proposes to make in the appeal and in respect of the costs of the Rule and the appeal.

A. N. R. C.

Rule made absolute. Appeal allowed.

(1) (1899) I. L. R. 21 All. 441.

(2) (1910) I. L. R. 32, All. 567.

(3) (1908) 10 P. L. R. 561.

(4) (1875) P. R. 34.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.

JARWA BAI

v.

PITAMBAR NILAMBAR SHAH AND OTHERS. *

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January, 28, 31.

Cross-examination—Adverse party—Evidence Act (I of 1872), section 137—Presidency Towns Insolvency Act (III of 1909), clause 18, schedule II, proceedings under—Purchaser of part of insolvent's property, if proper or necessary party—Cross-examination by such person, effect of—Notes of public examination of insolvent, if admissible against creditor.

A purchaser from a person who subsequently is adjudicated an insolvent is not a necessary or proper party to the proceedings under clause 18 of the second schedule to the Presidency Towns Insolvency Act and has no right to intervene therein when his purchase is not challenged. He, not being an adverse party, has no right to cross-examine the applicant for establishing the claim against the estate of the insolvent. The cross-examination held in contravention, should be eliminated from the record.

The notes of the public examination of the insolvent, though admissible against him under section 27 (6) of the Presidency Towns Insolvency Act, cannot be used against a creditor who had no opportunity to cross-examine him.

Appeal by the Applicant.

Application to establish the applicant's claim against the estate of the insolvent on the basis of an equitable mortgage.

On the 10th January, 1911, the applicant alleged that she advanced, on a deposit of title deeds by the borrower a sum of Rs. 12000 through her son Lachmichand to one Kissori Mohan Roy, who was subsequently adjudged an insolvent. When the appellant discovered that her name had not been included in the schedule, on the 5th February, 1914, she made an application for an investigation of her mortgage under clause 18 of the second schedule to the Presidency Towns Insolvency Act. In the course of these proceedings her claim was resisted by a firm named Pitambar Nilambar Shah, who had been described as creditors of the insolvent, although they asserted that they were not mortgagees but purchasers of a part of the estate of the bankrupt. They were permitted, however, to take an active part in the enquiry held under

* Appeal from Original Order No. 40 of 1914, against the order of Mr. Justice Chitty, sitting on the Original side (Insolvency jurisdiction), dated the 21st May, 1914.

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clause 18 without any determination of their precise position. The cross-examination of the witnesses was principally conducted by counsel on their behalf; the Official Assignee was also represented, but he took a subordinate part in the enquiry. The result was that after a full investigation, Mr. Justice Chitty came to the conclusion that the mortgage-debt of the appellant was not established. On appeal, the case was remanded for enquiry. Pursuant to that order Mr. Justice Greaves held that the firm of Pitambar Nilambar Shah were purchasers and not mortgagees of the estate of the insolvent.

Messrs. Langford James and B. K. Ghose for the Appellant.

Messrs. J. Bagram, and N. Ghatak for the Official Assignee Respondent.

Mr. N. Sircar for the Creditor Respondent.

C. A. V.

The judgments of the Court were as follows :

January, 31.

Sanderson C. J.—This is an appeal from a decision of Mr. Justice Chitty who heard the application which was made under the 18th clause of the second schedule to the Presidency Towns Insolvency Act of 1909. The application was made by the appellant Jarwa Bai, and the learned Judge has disallowed the claim on the ground that he thought that the alleged transaction between Jarwa Bai on the one hand and the insolvent on the other, was not a *bona fide* transaction. At the hearing certain opposing creditors appeared, the opposing creditors being named Pitambar Nilambar Shah and others, and in addition the Official Assignee appeared. The conduct of the case seems to have been mainly undertaken by the opposing creditors, and a considerable amount of cross-examination was undertaken by the opposing creditors, the learned Counsel appearing for them cross-examining first, and the gentleman who appeared for the official Assignee coming next. Now, it has been decided that those people who appeared as opposing creditors were not creditors at all. I need not go into the details of the procedure by which that decision has been arrived at. It is sufficient for me to say that under the direction of the Court of appeal an issue was tried by Mr. Justice Greaves; the issue was as to whether Pitambar Nilambar Shah and others were in fact creditors of the insolvent or not, and the learned Judge has decided that they were not creditors, and the result is that Pitambar Nilambar Shah and others ought never to have been allowed to appear at the enquiry which was held by the learned Judge. It is further to be pointed out that they were allowed to appear in spite of

the opposition of the applicant Jarwa Bai. The result of that has been that during the hearing of the appeal we decided that the evidence which was adduced by Pitambar Nilambar Shah and others who then appeared as opposing creditors ought not to be looked at : and not only that, but that the evidence which was elicited by cross-examination from the claimant and the insolvent by Counsel appearing for those parties ought not to be looked at, and therefore, for the purpose of deciding whether this appeal should be allowed or not on its merits, we have to consider only the evidence which appears in the paper-book, other than that referred to above. Now, on that evidence it appears that the claimant claims to be a creditor to the extent of Rs. 12,000 that she, holds a promissory note for that amount given to her by the insolvent, which she alleges to be a promissory note given to her in the ordinary course of money-lending business, and she also claims to be the holder of certain title-deeds which were deposited by the insolvent at or about the time the money was lent, and she, therefore, claims as equitable mortgagee of the property mentioned in these deeds. *Prima facie*, therefore, she comes forward as a creditor producing a certain document which on the face of it purports to be a promissory note, and in addition to that she holds some title deeds of the insolvent relating to some part of the insolvent's property. It, therefore, lies upon the Official Assignee and those who are assisting him to show to the satisfaction of the court that the transaction as alleged by the claimant who produced these documents was not a *bona fide* transaction, but in fact, as they alleged, was a fraudulent transaction.

Now, I think some of the comments which have been made by the learned Counsel for the Official Assignee and by the learned Counsel appearing for the opposing creditor in this court, in so far as they suggest that there were suspicious circumstances connected with the case, are to a certain extent justified. I have fully considered the points which they put forward, and I think there is weight in some of them, as for instance, the fact that there apparently was no entry in the attorney's books of the visit which the agent of the claimant is alleged to have paid to the attorney ; that there is no entry of any charge made for the advice which is supposed to have been given on that date, and that no body was produced from that office to prove that the promissory note was typed in that office. But giving all due weight to the comments and criticisms of those two learned Counsel upon the case, in my judgment the Official Assignee and the opposing creditor have not discharged the *onus*,

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and, upon the evidence which is now before us, they have not satisfied me that this was a fraudulent transaction. I quite recognise, as Mr. Bagram argued before us that it may be that the deposit of title-deeds without at the same time giving a memorandum of deposit may be contrary to the general practice in Calcutta. On the other hand, it is alleged that such transactions as these are sometimes loosely done, and title-deeds, are taken without the memorandum of deposit being given—it very largely depending upon what the relations are between the parties at the time the transaction is effected. I need not, however, say anything except that the Official Assignee and the opposing creditor who is now before us have not satisfied me that the transaction was a fraudulent one. For this reason I think the appeal ought to be allowed.

Then comes the further question as to whether we ought to remit this matter for further investigation by the learned Judge to inquire again whether this transaction was a fraudulent one or not. I have come to the conclusion that we ought not to do so, and for this reason: In my opinion, the proper person to investigate a matter of this kind was the Official Assignee. It was pointed out at the outset by the learned Counsel appearing for the claimant that the parties who claimed to be creditors ought not to be allowed to appear, and, as I understand, even at that early stage there was a dispute as to whether they were creditors or not, and further that even if they were creditors they ought not to be allowed to appear. In these circumstances the proper thing for the Official Assignee to do was to take charge of the proceeding, ask such question as he might think right, and, if he wanted any information which he himself did not possess but which was in the hands of the creditors to get such information and to conduct the investigation not only on behalf of the opposing creditors but on behalf of all the creditors of the estate whom he represented in his position as Official Assignee. As regards Mr. Sircar's client, to my mind, it would be a very dangerous precedent for us to allow an opposing creditor to come in on an appeal, not merely for the purpose of assisting the Official Assignee to argue the appeal which apparently was the ground upon which Mr. Sircar's client was allowed to appear in this Court, but for the purpose of getting this Court to order the enquiry to be started all over again in order that his client who did not appear at the original application, might have the application reheard from start to finish and that his client might have the conduct of the proceedings. I do not think that this is an application to which this Court

ought to accede. Therefore, I think this appeal ought to be allowed with costs.

With regard to the costs in the Court below, the learned Judge ordered the claimant to pay two sets of costs, one to the Official Assignee. With regard to these costs, any costs which have been paid to the Official Assignee must be repaid by him to the claimant out of the general assets of the estate: The learned Judge also ordered another set of costs to be paid by the claimant to the people who were then called the opposing creditors, namely Pitambar Nilambar Shah & others. Now, inasmuch as they are not here today, it would not be right for this Court to make any order as to costs in their absence. I am of opinion that they were largely responsible for the costs which were incurred in the Court below. I think they ought to be given notice by the claimant to come here and show cause in this Court why they should not be directed to repay the costs which they received in the Court below and why such other order should not be made as to this Court may seem proper.

As regards the costs of this appeal, the costs will be paid in the ordinary way, that is, by the Official Assignee out of the general assets of the estate. The costs of the Official Assignee will be paid out of the assets of the estate, as between attorney and client.

It is impossible for this Court to say how much of the 33000 rupees the claimant is entitled to, in respect of her mortgage: The Official Assignee will have to deal with that. If he has any doubt, it will be open to him to apply to the Judge in insolvency.

Woodroffe J.—I agree.

Mookerjee J.—This appeal is directed against a determination by Mr. Justice Chitty, under clause 18 of the second schedule to the Presidency Towns Insolvency Act, that the appellant had failed to establish her claim against the estate of the insolvent on the basis of an equitable mortgage. The case for the appellant is that on the 10th January, 1911, she advanced, on a deposit of title-deeds by the borrower, a sum of Rs. 12000 through her son Lachmi Chand Karnawat to one Kissori Mohan Roy who has been subsequently adjudged an insolvent. When the appellant discovered that her name had not been included in the schedule, on the 5th February, 1914, she made an application for an investigation of her mortgage under clause 18 of the second schedule to the Insolvency Act. In the course of these proceedings, her claim appears to have been resisted by a firm named Pitambar Nilambar Shah, who had been

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described as creditors of the insolvent, although they asserted that they were not mortgagees but purchasers of a part of the estate of the bankrupt. If the position they took up was correct, they would not be necessary or proper parties to the proceedings and their right to intervene therein was, as might be expected, challenged at an early stage. They were permitted, however, to take an active part in the enquiry held under clause 18, without any determination of their precise position. Indeed, the record shows that the cross-examination of the witnesses was conducted principally by Counsel on their behalf; the Official Assignee was no doubt represented, but he appears to have taken only a subordinate part in the enquiry. The result was that, after a full investigation, Mr. Justice Chitty came to the conclusion that the mortgage-debt of the appellant was not established. When the present appeal, to which Pitambar Nilambar Shah were joined as opposing creditors, was taken up for disposal sometime ago, the Court of Appeal directed that their status should, in the first instance, be determined and an issue to that effect was sent down for investigation. It has now transpired, on an enquiry made by Mr. Justice Greaves pursuant to the order of the Court of appeal, that Pitambar Nilambar Shah were purchasers and not mortgagees of the estate of the insolvent. The consequence follows that they are not creditors of the insolvent; they were thus not proper parties to the proceedings in the Court below, nor are they proper parties to this appeal; and, as a matter of fact, they have not been represented at this the final hearing of the appeal before this Court.

On behalf of the appellant, two points have been urged, namely, *first*, that all the cross-examination held at the instance of Pitambar Nilambar Shah should be eliminated from the record, and *secondly*, that the public examination of the insolvent under section 27 cannot be used as evidence against her. In my opinion, both the objections are well founded and must prevail.

As regards the first point, it has been argued on behalf of the Official Assignee as also of a creditor who did not appear in the Court below but who upon his own application has been made a party respondent to this appeal, that the course proposed should not be adopted, and, that, if the argument of the appellant prevails, the case should be remanded for a fresh investigation. Mr. Sircar who appeared on behalf of the added respondent has further argued that the statements made by the son of the appellant in cross-examination may, in any event, be treated as admissions within the meaning of the Indian Evidence Act, and may accordingly be

considered by the Court in the determination of this appeal. In my opinion, it is obvious that the cross-examination at the instance of Pitambar Nilambar Shah must be entirely eliminated from the record. The right to cross-examine belongs, as is clear from section 137 of the Indian Evidence Act, to an adverse party. The firm of Pitambar Nilambar Shah did not in reality occupy the position of an adverse party, as has now been finally decided. Consequently, no right to cross-examine was vested in them. It follows conclusively that they should not have been allowed to intervene in the proceedings and to take part in the cross-examination of the witnesses and the record must be restored to the condition it would have attained had there been no cross-examination at their instance. It is also clear that the ingenious argument that the statements made by the son of the appellant may be treated as admissions, is entirely untenable. Section 18 of the Indian Evidence Act, upon which reliance has been placed, provides that "Statements made by a party to the proceeding or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions." In the first place, it is clear that section 18 can be of no avail if the cross-examination is, as I hold it must be, eliminated; in the second place, it is clear that the statements mentioned were not made by a party to the proceedings, nor were they made by an agent to any party whom the Court may properly regard, under the circumstances, as expressly or impliedly authorised by him to make them. We cannot reasonably hold that the son of the appellant was even impliedly authorised to make those statements under the circumstances in which they were made, namely, in answer to the questions improperly put in cross-examination by a party not entitled to participate in the proceedings. I hold accordingly that the statements in cross-examination conducted at the instance of Pitambar Nilambar Shah must be ignored.

As regards the second point, it is incontestable that the notes of the public examination of the insolvent, though admissible against him under section 27 (6) [*R. v. Erdheim* (1)] cannot be used against a creditor who had no opportunity to cross-examine him, and it is noteworthy that though the insolvent was examined afresh in the present proceeding, no attempt was made to contradict him by reference to the notes of his public examination.

We must accordingly consider the case on the remainder of the evidence, and, when we do so, it becomes plain that the decision of

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Mr. Justice Chitty cannot be supported. There is a *prima facie* case established on the evidence that the transaction which forms the basis of the claim of the appellant was real and that a sum of Rs. 12000 was actually advanced by the appellant to the debtor, as alleged by her son. This case has not been successfully met by the Official Assignee or by any of the creditors; her claim to rank as a secured creditor of the insolvent must consequently succeed.

But it has been argued that the Official Assignee as also the added respondent should be allowed an opportunity to have the matter re-investigated in their presence. I think we should not accede to this application. The added respondent did not appear in the Court below. I need not decide whether he was entitled as a matter of right to intervene in the proceedings; if he was so entitled, he should have availed himself of the opportunity and cannot now claim an indulgence; if he was not entitled to appear, he cannot now ask for a retrial. The official assignee is in no better position; he did appear in the Court below, and, no good reason has been assigned why he took a Subordinate part in the proceedings and why he permitted the cross-examination of the witnesses to be conducted in the main by a party who was not only not admitted to be a creditor, but whose right to intervene in the proceedings at all was challenged.

On these grounds, I hold that this appeal must be allowed and the order of Mr. Justice Chitty discharged.

The respondent then applied for review of judgment and obtained a rule on the 21st March, 1916, which came on for hearing on the 10th April, 1916.

Mr. N. Sircar in support of the Rule.

Mr. B. K. Ghose (with him *Mr. Langford James*) showed cause.

The principal contention urged in support of the review was that the case should be remitted to the trial Court for further enquiry.

In answer to the rule it was pointed out that the order sought to be reviewed had been carried out and the money had already been paid on its basis.

The Court held that sufficient grounds had been made out to justify the rule being made absolute on Mr. Sircar's client undertaking to give security for rupees 2000 to the satisfaction of the Registrar within one week.

The appeal was then reheard on the 18th April, 1916, when the following judgments were delivered :—

Sanderson, C. J.—In my judgment this is a somewhat difficult case, and the circumstances are quite out of the ordinary and I hope exceptional. When the case was last before us we decided the appeal upon part of the evidence which was given before Mr. Justice Chitty. We did not look at the other part of the evidence on the ground that, that evidence had been elicited by a party who, in our opinion, had no right to be present in the proceedings. There was no statement made, when that hearing was taking place, to the effect that the cross-examination of the witnesses by the Counsel appearing for Pitambar Nilambar Shah had been adopted by the Official Assignee ; since then, facts have been brought to our notice, with regard to what took place in the Court below, upon which the allegation was based, that the cross-examination by the learned Counsel who was appearing for Pitambar Nilambar Shah had in fact been adopted by the Official Assignee. Speaking for myself I am not even now satisfied that the cross-examination was adopted in such a way as to make it clear to the Court that the Official Assignee was adopting in its entirety the cross-examination by the learned Counsel for Pitambar Nilambar Shah. But it has been made clear to me that it is probable that there was some misunderstanding, some misapprehension, as to what the position of the various parties was : and, as this is not a matter confined to the claimants on the one hand and Mr. Sircar's client on the other, but is a matter which affects the interest of all the creditors in the estate, and inasmuch as the sum involved is a large sum, I think that the interests of justice will only be served by having this matter further enquired into : "Therefore, the case should be remanded to the Insolvency Court for the purpose of having the enquiry held : and, when that enquiry is held the Official Assignee will appear on behalf of all the creditors. Mr. Sircar's client was given leave to appear at the hearing of the appeal in order that he might assist the official Assignee in the argument on the appeal. He has so appeared and the proceedings in connection with the appeal are now at an end. Therefore, Mr. Sircar's client's right to appear in these proceedings also comes to an end. It is our opinion that when the further hearing takes place the Official Assignee—and I think that this was intended by the Insolvency Act—should appear and conduct the proceedings on the part of all the creditors and in the interests of all of them. Mr. Sircar's client will have, no right to appear in that further hearing, unless he can convince the

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Court of first instance that he has a right to do so independent of the leave which was given by the appeal Court to appear in the hearing of the appeal.

As regards the costs of this appeal, Mr. Sircar's client gave an undertaking to be responsible for them if the Court thought right to make him pay them; or, the Court may deal with them in any way it thinks fit. It may turn out that the further hearing may be wholly infructuous: and, if that contingency does arise then these infructuous proceedings will have been taken at the instance of Mr. Sircar's client. Therefore, we propose to withhold our decision with regard to the costs of Mr. Sircar's client, until we know the result of the further hearing.

With regard to the costs of Mr. James's client and of the Official Assignee, I think they should abide the event of the further hearing.

I should add that this order which we have made must be taken as having been made at the instance of the Official Assignee for whom Mr. Bagram appears, and who has stated this morning that he asked us for this order of remand.

Woodroffe, J.—I agree.

Mookerjee, J.—I agree.

Appeal allowed, case remanded.

APPELLATE CIVIL.

Before Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

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January, 14, 17.
April, 17.

SARODA PRASAD ROY CHAUDHURI AND OTHERS

v.

KHAJA MAHAMMAD YUSUF AND ANOTHER.*

Fishery right—River, changing its course—Fishery, owner of—New channel, fishery right in, belonging to another—Owner of the fishery, if entitled to follow the river.

The owner of the fishery of a river which has taken a new course and flows through a channel in which another has a right of fishery cannot, share in the fishery in the united waters.

* Appeal from Appellate Decree, No. 3903 of 1912, against the decision of R. Garlick Esq., District Judge of Dacca, dated the 13th August, 1912, affirming that of Bubu Sarat Chandra Sen, Subordinate Judge, 4th Court, of Dacca, dated the 17th December, 1910.

Nobin Chunder Roy Chowdry v. Radha Pearce Debia (1) referred to.

Raja Srinath Roy v. Dinabandhu Sen (2) distinguished.

The solution of the question as to whether the owner of the fishery of a river is entitled to follow the river when it has changed its course lies mainly in the answer that can be given to the question whether or not the invading river has lost its identity.

Appeal by the Plaintiffs.

Suit for declaration of title to and possession of the fishery in the branch of the river Buriganga, known as 'Turag.

The material facts will appear sufficiently from the judgment of Beachcroft J.

Sir Rash Behary Ghosh, Babu Jogesh Chandra Roy and Babu Rajendra Chandra Guha for the Appellants.

Babu Ram Charan Mitra, Babu Mohendra Nath Roy, Moulvi A. K. Fuzlul Huq, and Babu Prokash Chandra Pakrashi for the Respondents.

C. A. V.

The following judgments were delivered :

Beachcroft, J.—The Buriganga is a large river in the Dacca District. One of its tributaries, flowing into it from the north is the Turag River. About seven miles from the Buriganga, the Turag bifurcates. The western branch after bifurcation, appears to have been always known as the Turag and fell into the Buriganga in the neighbourhood for village Bhakurta. The eastern branch to which, or to parts of which, different names have been given such as Saparia River, Mirpur River and Maspara River, joins the main river not very much further down. The plaintiffs are the owners of the fishery in the branch which went by the name of the 'Turag, while the defendants owned the Buriganga fishery, which included the channel in dispute.

The western branch no longer falls into the Buriganga near Bhakurta. The mouth of that branch silted up many years ago and the Turag took a new course to the east and having joined the eastern branch near village Mirpur now discharges its waters into the Buriganga through the last half mile or so of the eastern branch. It is the fishery in this last stretch of water from Mirpur village to the Buriganga that is in dispute in this case.

Both Courts have dismissed the plaintiffs' suit for declaration of title and possession, finding that title has not been proved.

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(1) (1866) 6 W. R. 17.

(2) (1914) 20 C. L. J. 385 ; I. L. R. 42 Calc. 489.

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It is now argued on appeal, on the authority of the case, *Raja Srinath Roy v. Dinabandhu Sen* (1), that the plaintiffs, as owners of Turag fishery were entitled to follow the river when it changed its course and therefore they are entitled to at least a share in the fishery from Mirpur down to the Buriganga.

In any attempt to apply the decision referred to to the present case, it must be remembered that in the case before the Privy Council the river under discussion had made for itself a new channel where none existed.

The principle enunciated in that case will apply to the Turag fishery up to the point where the Turag branch joins the eastern branch, but there the parallel between the two cases stops.

At first sight it would seem a simple solution to say that the owners of the two fisheries should share in the fishery in the united waters. Now apart from the objection that the result would be that the invaded fishery would for a certain portion of its length lose the character of a several fishery, there are practical difficulties in the way of adopting this apparently simple solution. In the first place there would be the difficulty of estimating the respective shares to be allotted to the two fisheries; the benefit, if any, to the invaded fishery might vary at different seasons of the year. It is not by any means certain that the invaded fishery would be benefited by the addition of the waters of the invading river. There would be an opportunity for more fish to come into the fishery, but there would be a corresponding opportunity for more to go out. The influx of the new river might be positively injurious to the existing fishery, the whole natural advantages of which it might affect, or even destroy. There would be nothing to prevent the owner of the invading river placing a barrier across his river to prevent the exit of fish from his river, while enjoying a share in the fishery in the mingled water of the two rivers.

I am aware of only one case in which a similar question has been decided, the case of *Nobin Chunder Roy Chowdhry v. Radha Peari Debia* (2). In that case it was decided that a person's rights were not increased because his river flowed through a channel in which another had a fishery. This case was referred to in the case of *Raja Srinath Roy v. Dinabandhu Sen* (1), and it was distinguished from other cases cited on the ground that the dispute was between the owners of two fisheries and not between

(1) (1914) 20 C. L. J. 385 ; I. L. R. 42 Calc. 489.

(2) (1866) 6 W. R. 17.

the owner of a fishery and the owner of the subjacent soil over which the river had been diverted.

In my opinion the solution of the question lies mainly in the answer that can be given to the question whether or not the invading river has lost its identity. In extreme cases the answer would probably not be difficult. In the case where the invading river was insignificant in size in proportion to the invaded river there would probably be no hesitation in saying that the former river had lost its identity. At the other end of the scale we might have the case of the invading river being so powerful as to destroy the channel of the invaded river and divert it into a new course. In that case the answer would probably be that the invaded river and not the invader had lost its identity. It is in intermediate cases that difficulty would be felt. It is impossible to prescribe any hard and fast rules for the purposes of ascertaining the conditions in which the river may be said to have retained or lost its identity. And I feel the less inclination to attempt to do so as this aspect of the matter was not made the subject of any detailed discussion before us. And there is another equally weighty reason for not making the attempt, namely, that the lower Courts were not asked to consider the plaintiffs' right from this point of view at all. If we were to give effect to the argument we should have to remand the case for findings, for which fresh evidence would have to be taken. That would in my opinion be unjustifiable as the case made by the plaintiff in their plaint was that the whole of the eastern branch of the Turag below the bifurcation down to the Buriganga was included in their fishery.

That case having failed and the attempt to establish title by adverse possession having failed the plaintiffs have been driven to set up a new case and as that new case would depend on fresh evidence it is too late to entertain it now.

I think the appeal should be dismissed with costs, to be divided half and half between the Government and the Nawab.

Chatterjee, J.—I agree.

A. N. R. C.

Appeal dismissed.

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Before Mr. Justice N. R. Chatterjea, and Mr. Justice Richardson.

RAJENDRA KUMAR ROY AND OTHERS

v.

MAHARAJA MANINDRA CHANDRA NANDI. *

CIVIL

1916.

May, 4, 10.

Diluvion—Jote, total extinction of—Kabuliat—Tenant, if liable to pay rent.

Rent is paid by a tenant for the use of land, and if for no fault of his own, the lands are washed away, he cannot, on general principles, be held liable to pay rent.

Afsurooddin v. Musst Shorooshee Bula Dabee (1) and *Sheik Enayutoollah v. Sheik Elaheebuksh* (2) referred to.

A kabuliat contained a stipulation to the effect—"cultivation or non-cultivation, profit or loss in respect of the jote shall be ours. We shall not be competent to make any objection to the rent settled :"

Held, that the lessees thereby agreed not to make any objection to pay rent only on the grounds stated, *viz*, non-cultivation, and similar grounds which pre-suppose the existence of the lands, and not where the lands are entirely washed away; and as such they were not precluded by the terms of the kabuliat from pleading non-liability to pay rent if all the lands of the jote were washed away.

Appeals by the Defendants.

Suit for arrears of rent.

The material facts will appear sufficiently from the judgment of N. Chatterjea, J.

Babus Jogesh Chandra Roy and Madhab Gobind Roy for the Appellants.

Babus Ram Churn Mitter, Jogesh Chandra Dey, Hemendra Nath Sen and Sarat Kumar Mitter for the Respondents.

C. A. V.

The following judgments were delivered :

N. Chatterjea J.—These appeals arise out of suits for rents of two jotes, one comprising 24 bighas and odd, and the other 23 bighas and odd.

The defence was that all the lands of the jotes had diluviated and that the defendants were not therefore liable for the rent. There was a local investigation by a commissiner, and it was found that the jotes "suffered total extinction on account of diluvion."

The lands were held under two kabuliat for a term of 5 years, and there was a stipulation that on the expiry of the term a fresh settlement would be taken on enhanced rents. No fresh settlement

* Appeals from Appellate Decrees, Nos. 2388 and 2759 of 1914, against the decrees of M. Yusuf, Esq., District Judge of Rungpur, dated the 14th of May, 1914, reversing the decrees of Babu Annada Prosad Majumdar, Munsiff, 1st Court, at Gaibandha, dated the 31st March, 1913.

(1) (1863) Marshall 558. (2) (1864) W. R. Gap. No. Act. X Rulings 42.

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was taken, and the defendants paid rent for two years (after the expiry of the lease) during which the lands were partly diluviated. They did not pay rent for the years in suit as the lands were wholly washed away.

The Court of first instance dismissed the suit, but his decree was reversed and the suit was decreed, by the Court of appeal below. The defendants have appealed to this Court.

The learned District Judge differing from the Munsiff held that according to the agreement contained in the kabuliat the lessees were not entitled to claim any reduction of the rent.

The jotes consisted of 24 bighas and 23 bighas of land respectively but they were stated to be tenures in the written statement and in the judgment of the Court of appeal below, and the arguments in this Court proceeded upon that footing.

The learned District Judge observes—"Now one of these stipulations is to the effect that on no account should the lessee be entitled to claim any reduction of the rent settled under the kabuliats." The kabuliat however does not contain the words "on no account." All that it says is that the "cultivation or non-cultivation; profit or loss in respect of the jote shall be ours. We shall not be competent to make any objection to the rent settled." We think that the lessees agreed not to make any objection to pay rent, only on the grounds stated before viz., non-cultivation etc., on similar grounds which pre-suppose the existence of the lands and not where the lands are entirely washed away. Had it been intended that the lessees would be bound to pay rent even if the lands were diluviated, it would have been so stated in the kabuliats. We are of opinion that the lessees were not precluded by the terms of the kabuliats from pleading non-liability to pay rent if all the lands of the jotes were washed away. That being so, we think the defendants are exempted from the payment of rent for the years in suit.

It is contended on behalf of the respondents that as the defendants were holding over, they were liable to pay rent so long as they did not surrender the jotes or avoid the tenancy. But rent is paid by a tenant for the use of land, and if for no fault of his own, the lands are washed away, he cannot, on general principles, be held liable to pay rent. Section 52 of the Bengal Tenancy Act provides that every tenant shall be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of of his tenure or holding as compared with the area for which rent has been previously paid by him. In the present case all the lands

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of the tenure had been washed away, and we do not see why the defendants are not entitled to claim exemption from payment of rent in a suit for recovery of rent. In the case of *Afsurooddin v. Musst. Shorooshee Bula Dabee* (1), Sir Barnes Peacock C. J. observed "It was contended that the respondent would not be entitled to any diminution of rent if the land had been washed away. But we think he is so entitled, unless there was an express stipulation that he should pay whether the land was washed away or not. If a man stipulates to pay rent, it is clear that he engages to pay it as compensation for the use of the land rented, and independently of section 18, Act X of 1859, we are of opinion that according to the rules of law, if a Talookdar agrees to pay a certain amount of rent, the tenant of it is exempt from the payment of the whole rent if the whole of the land be washed away or of a portion of the rent, if a portion only be washed away. According to English law a tenant is entitled to abatement in proportion to the quantity of land washed away, and he is entitled to that abatement in a suit brought by the landlord for arrears of rent."

Again in *Sheik Enayutoollah v. Sheikh Elaheebuksh* (2) Sir Barnes Peacock C. J. held that a tenant whether with or without a right of occupancy is entitled to abatement of rent for land washed away, unless precluded by the terms of the Kabulyat from claiming that abatement, and referring to the rule laid down in Bacon's Abridgment 7th Edition Vol. vii, page 63, that if the use of the thing be entirely lost or taken away from the tenant the rent ought to be abated or apportioned because the title to the rent is founded upon this presumption that the tenant enjoys the thing during the contract, observed that the rule is founded on the principles of natural justice and equity that if a landlord let his land at a certain rent to be paid during the period of occupation, and the land is by the act of God, put in such a state that a tenant cannot enjoy, the tenant is entitled to an abatement.

We are accordingly of opinion that the defendants are not liable for the rents claimed. The decrees of the Court of appeal below are reversed and those of the Court of first instance restored with costs here and in the Court below.

Richardson, J.—I agree and merely add that a similar principle is enunciated in clause (e) of section 108 of the Transfer of Property Act.

A. N. R. C.

Appeals allowed.

(1) (1863) Marshall 558.

(2) (1864) W. R. Gap. No. Act X Rulings 42.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.*

JATINDRA NATH RAY AND OTHERS

v.

SAHIDANNESHA KHATUN AND OTHERS *

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Co-owner—Title, denial of—Joint possession—Ouster, what constitutes.

Where the defendants, who appeared to be co-sharers of the plaintiffs as regards the land in dispute, had all along been denying the title of the plaintiffs, and setting up the interest of a third party, and asserted that they had been in possession of the land under that person :

Held, in a suit for recovery of possession of the land upon declaration of title, that the plaintiffs were entitled to a decree for joint possession.

Watson & Co. v. Ram Chund Dutt (1), *Lachmeswar Singh v. Manowar Hossein* (2), and *Mohesh Narain v. Nowbut Pathak* (3) distinguished.

Per Mookerjee, J. :—*Prima facie*, co-owners are entitled to hold joint possession of joint property ; consequently, if one co-sharer seeks to defeat the claim of another co-sharer to joint possession of joint property, special circumstances must be alleged and established so as to justify exclusive occupation of the joint property by one of the co-owners.

A co-sharer who has been ousted from joint property is entitled to recover joint possession. ●

Mohesh Narain v. Nowbut Pathak (3) and *Lokenath v. Dhakeswar* (4) referred to.

To constitute ouster a physical eviction is not essential ; if a co-owner is in possession on behalf of or under an adverse claimant under such circumstances as to evidence a claim of exclusive right and title and a denial of the right of the other co-owners, there is an ouster in law.

The acceptance by the defendants of a lease of the disputed land from an adverse claimant, and their entry upon the land in assertion of the title so derived from the adverse claimant, should be deemed to be an ouster of their co-sharers, the plaintiffs.

Biseswar v. Bhagabati (5) relied on.

* Letters Patent Appeal, No. 59 of 1914, against the decision of Mr. Justice Mullick, dated the 19th May, 1914, in Appeal from Appellate Decree No. 1468 of 1908, against the decree of S. N. Mitra Esq., Subordinate Judge of Faridpur, dated the 31st March, 1908, modifying the decision of Babu Birendra Kumar Dutta, Munsiff at Bhanga, dated the 15th June, 1907.

(1) (1890) I. L. R. 18 Calc. 10 ; L. R. 17 I. A. 110.

(2) (1891) I. L. R. 19 Calc. 253 ; L. R. 19 I. A. 48.

(3) (1905) 1 C. L. J. 437 ; I. L. R. 32 Calc. 837.

(4) (1914) 21 C. L. J. 253.

(5) (1915) 24 C. L. J. 38.

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Appeal by some of the Defendants.

Plaintiffs brought this suit for recovery of joint possession of the land in dispute on declaration of their title to $\frac{5}{8}$ ths share thereof. The contesting defendants admitted the plaintiffs' allegation that the plaintiffs were entitled to $\frac{5}{8}$ ths share in Zemindari No. 5557, and they, the defendants, were entitled to $\frac{3}{8}$ th share in that Zemindari; but they alleged that the land in question did not belong to No. 5557 at all, but belonged to estate No 2540, and that the owner of estate No. 2540 granted to them a lease, and accordingly they settled the land with tenants, and were in possession of the same by virtue of that title.

The Court of first instance found that the disputed land was not included within the plaintiffs' mouza, that the suit was barred by limitation and was bad for misjoinder of causes of action, and as such dismissed the suit.

On appeal the learned Subordinate Judge held that the land was situated within the plaintiffs' Mouza, and reversing the findings of the first Court, decreed the suit giving the plaintiffs joint possession with the defendants.

Against that decision the contesting defendants preferred an appeal to the High Court.

Babu Provas Chandra Mitra for the Appellants.

Babu Surendra Chandra Sen for the Respondents.

The following judgment was delivered by

Mullick, J.—The land in dispute consists of three plots measuring 4 bighas. For the sake of convenience, I will describe them as plots (a), (b) and (c) corresponding respectively to plots ka, kha, and ga. The plaintiffs claim this land as part of their estate No. 5557 in which they are co-sharers to the extent of 13 annas 3 pies and the defendants Nos. 18 and 19 to the extent of 2 annas 8 pies.

The plaintiffs allege that these defendants together with other defendants have dispossessed them. The defendants Nos. 20 and 21 claim the lands as appertaining to their Mouza Probhakardi, estate No. 2540. They allege that plot (c) is debutter land in the possession of their tenants and that plots (a) and (b) together with the rest of the Mouza have been leased by them in *patni* to the defendants Nos. 18 and 19. The defendants Nos. 18 and 19 support this case and claim to be in possession of plots (a) and (b) through their tenants for over 40 years. The remaining defendants are tenants.

The Munsiff found that the lands in suit were not included

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within the plaintiffs' Mouza. He also found that the suit was barred by limitation, and was bad for misjoinder of causes of action. On appeal, the subordinate judge found that the land was situated within the plaintiffs' Mouza and he has decreed the suit giving the plaintiffs joint possession with the defendants Nos. 18 and 19 with mesne profits to be ascertained in the Execution Department. The defendants Nos. 18 and 19 prefer this present second appeal.

A preliminary objection is taken to the effect that substitution has not been made in due time of the heirs of the plaintiff Jogendra Nath Roy and the defendant Debendra Nath Roy who died respectively on the 15th October 1909 and 27th November 1909. Substitution subject to objection was allowed to be made by the Bench in which the appeal was filed. I have now heard the parties and the objection to substitution after the proper time and am satisfied that there was sufficient ground for the delay. That ground is that owing to the death of an important servant of the appellant, it was not known that Jogendra Nath Roy and Debendra Nath Roy had died. It is explained that there was great confusion among the papers of the deceased servant. The delay under the circumstances is justifiable.

I next proceed to discuss the merits of the appeal.

The first question is whether a decree for joint possession can at all be sustained in this case; or whether the proper remedy for the plaintiffs is to sue for partition.

Prima facie, it would appear that the case of *Watson & Co. v. Ram Chund Dutt* (1) is a bar to the plaintiff's prayer for joint possession. But that case is distinguished on the ground that in order that a co-sharer defendant may avail himself of the principle laid down in that case, he must show that he has been engaged in a proper course of cultivation. In the present suit the co-sharer defendants having set up a title adverse to that of the plaintiffs and inconsistent with the plea of joint ownership, it can not be said that they are carrying on a proper course of cultivation. I think that there is no substance in the distinction sought to be made.

In the case of *Lachmeswar Singh v. Manowar Hossein* (2) their Lordships observed as follows:—"But then they ask to have it declared that the river and the ferry are within Mouza Boigra and that the defendants may be restrained from offering opposition to their possession. If the defendants had not denied that title, it would clearly not have been proper to give them any such relief.

(1) (1890) I. L. R. 18 Calc. 10.

(2) (1891) I. L. R. 19 Calc. 253.

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Should it make any difference in this respect that when asked to account for the profits of the ferry, the defendant has sought to protect himself by setting up a title in himself to the profits of the ferry and to the landing places? With some doubt, their Lordships think not."

Upon the authority of the above case it would appear that even if the defendants at the trial set up the plea that the lands were not situated within the mouza jointly held by them with the plaintiff, that plea would not be sufficient to deprive them of the benefits of the equitable principles laid down in *Watson's* case (1). These principles have been further discussed in *Mohesh Narain v. Nawbut Pathak* (2) and the conclusion at which the Court arrived was that where the defendant has not received more than his just share, he is under no liability to account to his other co-sharers.

In the case before us, there is no evidence that the profits made by the appellants from the 4 bighas in suit are more than their just share. Therefore, they are not liable to account to the plaintiffs.

It is also to be noticed that there is no finding that there has been any exclusion of the plaintiffs from enjoyment of the common property. The plea at the trial that the land was not part of the plaintiff's mouza does not in my opinion amount to exclusion.

In this view of the case the plaintiffs are not entitled to a decree for joint possession.

It is not necessary, therefore, to consider the question whether mesne profits should or should not be allowed and whether the suit is bad for misjoinder.

The appeal succeeds. The decree of the lower appellate Court is discharged and in its place there will be a decree merely declaring that the land in suit appertains to the plaintiffs' mouza.

The appellants will get their costs throughout.

The plaintiffs appealed under section 15 of the Letters Patent.

Babu Surendra Chandra Sen for the Appellants.

Dr. Dwarka Nath Mitter (for *Babu Provas Chandra Mitter*) for the Respondents.

The following judgments were delivered:

Sanderson, C. J.—In this case, in my judgment, this appeal should be allowed.

The action was brought by the plaintiffs claiming a declaration of their title to $\frac{5}{8}$ ths share in a certain property, and also claiming that on the declaration of that title the plaintiffs should be admitted

(1) (1890) I. L. R. 18 Calc. 10.

(2) (1905) 1 C. L. J. 437.

to joint possession with their co-sharers and they also claimed mesne profits.

In the first Court the suit was dismissed altogether. In the second Court, the plaintiffs obtained a decree for a declaration of their title and for joint possession with their co-sharers who are defendants Nos. 18 and 19. Defendants Nos. 18 and 19 appealed.

Mr. Justice Mullick upheld the decree so far as it concerned the title, but held that the plaintiffs were not entitled to joint possession with their co-sharers. The issues in the case were

First—Is the suit barred by limitation?

Second—Is the suit bad for defect of parties?

Third—Is the suit bad for misjoinder of parties and causes of action?

Fourth—Does the land in suit appertain to Mouja Muksudpur and Zemindari No. 5557?

Fifth—What relief, if any, are the plaintiffs entitled to?

Sixth—Have the plaintiffs their alleged right to the lands in suit?"

In the Court of first instance, one of the material points in dispute between the parties was as to whether the land in dispute belonged to Zemindari No. 5557, or to Estate No. 2540, the defendants alleging that they admitted that the plaintiffs were entitled to $\frac{5}{8}$ ths share in Zemindari No. 5557, and that they, the defendants were entitled to $\frac{1}{8}$ th share in that Zemindari. But they also alleged that the land in question did not belong to No. 5557 at all, but belonged to No. 2540. Their case was that the owner of Estate No. 2540 granted to these defendants Nos. 18 and 19, a lease, by reason of which they settled the land with the tenants in the year 1896, so that the defendants were alleging that the plaintiffs had no interest whatsoever in the land in question, but that on the contrary the land belonged to the owner of Estate No. 2540, and that they were tenants of the land.

The questions stated by the learned Judge of the first Court of appeal were in substance the same as what they were in the first Court, but they were stated rather differently. The first issue was whether the plaintiff's claim was barred by limitation. The second was whether the disputed land was within the plaintiff's Zemindari in Mouza Makshudpur and whether the defendants had the alleged right. That right is one which I have just now referred to, namely, the right of lessees under the owner of No. 2540. The third issue was whether the plaintiffs were entitled to get *khas* possession and *wasilat*.

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Now, the learned Judge of the first appellate Court held that the land in question was part of Estate No. 5557, as the plaintiffs alleged, and thereby decided that point against the defendants. He also held that the case was not barred by limitation.

Then when the case came to the High Court, the defendants Nos. 18 and 19 shifted their ground : They realized that they must now approach the case from the point of view that the land in question was part of No. 5557, although all along they, the defendants, had asserted that it belonged to No. 2540, and that they urged inasmuch as, they, the defendants Nos. 18 to 19, were co-sharers with the plaintiffs in that Estate No. 5557, and they had been in occupation thereof, they could not be deprived of possession, placing reliance upon the cases which have been referred to in the course of Mr. Justice Mullick's judgment. The first of these cases was *Watson & Co. v. Ram Chund Dutt* (1); the second was *Lachmeswar Singh v. Manowar Hossein* (2); and the third was *Mohesh Narain v. Nawbut Pathak* (3); in which Mr. Justice Harington and my learned brother Mr. Justice Mookerjee gave the decision. In my judgment, none of those cases covers this case. The defendant Nos. 18 and 19 asserted all along that their right to the land in question depended upon the title of a third person, namely, the owner of Estate No. 2540, and that they were in possession of the land under that person. They disputed the plaintiff's allegation that this land was part of the zemindari of which the plaintiffs and the defendants were co-sharers : and, consequently this case does not come within the decision in *Watson & Co.'s* case (1), which is the basis of all these cases for this reason : In that case the land was held by two persons in common, one of whom was in actual occupation of part cultivating it as if it had been his separate property the other co-sharer attempted to enter on the land : the co-sharer in occupation resisted and it was held that as the resistance was made for the object of protecting himself in the profitable use of the land in good husbandry and not in denial of the other's title, such resistance was no ground for proceedings on the part of the other to obtain a decree for joint possession. In this case, defendants Nos. 18 and 19, although as a matter of fact it turns out now, that they were co-sharers of the land in question, had in fact all along been setting up the interest of a third party and were denying the title of the plaintiffs. For this reason I think that this case in no way comes within the decision in *Watson & Co.'s* case (1)

(1) (1890) I. L. R. 18 Calc. 10.

(2) (1891) I. L. R. 19 Calc. 253.

(3) (1905) 1 C. L. J. 437.

The passage in the subsequent case, *-Lachmeswar Singh v. Manowar Hossein* (1), which was read at my request by Dr. Dwarka Nath Mitter shows that that decision was based upon the reason that although the co-sharer had set up the ferry and at one time had disputed the right of his co-sharers to have anything whatever to do with it, it was held that although he had taken up that position, he did not interfere with the plaintiffs', the co-sharers', possession of the river and he in fact did not exclude any co-sharers. In the present case the defendants did exclude the co-sharers: Through their tenants they occupied the land not as co-sharers but, as already pointed out, setting up the title of a third party and denying the plaintiff's title and by so doing they excluded the co-sharers, the plaintiffs. For these reasons the cases to which I have referred do not cover this case. The learned Judge, I think with great respect to him, was misled when he thought there was any similarity between the facts of this case and those of the above-mentioned cases.

With regard to the last point which was urged by Dr. Dwarka Nath Mitter, namely, that this case should be remitted to the Court of first instance, in order that an issue should be tried between the plaintiffs and the defendants, treating them both as co-sharers, and in order that the defendants might be allowed to set up the defence that they had been in occupation of the land in question as co-sharers and were cultivating the land as co-sharers with the consent of the plaintiffs, although personally I am always most anxious that the real issues between the parties should be investigated, especially if that can be done by making proper provision as regards costs, I do not think that this is a case in which we should do that. It has been pointed out by my learned brother Mr. Justice Mookerjee that this litigation has been going on for the last ten years and it was not until the last moment when the case came before Mr. Justice Mullick in the High Court that this point apparently was ever thought of. Besides it was quite inconsistent with the case set up in the Court below. I do not think we would be doing justice to the plaintiffs in this case if we were to accede to this argument of the learned Vakeel.

For these reasons I think this appeal should be allowed the judgment of Mr. Justice Mullick set aside and that of the first appellate Court restored. The plaintiffs are entitled to their costs of this appeal and the appeal before Mr. Justice Mullick.

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Mookerjee, J.—I agree that the judgment of Mr. Justice Mullick cannot be supported.

The plaintiffs instituted this suit on the 23rd February, 1906, for recovery of possession of a parcel of land upon declaration of title. Their case, shortly stated, was that the disputed land was comprised in estate No. 5557 on the revenue rolls of the Collector of Faridpur, that they along with the eighteenth and nineteenth defendants, were proprietors of that estate in the proportion of five to one ; and that on the 18th February, 1897, their co-sharers and the other defendants had unlawfully taken exclusive possession of the land. They prayed accordingly for recovery of joint possession on declaration of the aforesaid title to a $\frac{5}{8}$ ths share of the land in suit. The defence in substance was that the disputed land was not comprised in estate No. 5557, that it did not constitute the joint property of the plaintiffs and their co-sharer defendants, that it was the property of the two other defendants who were proprietors of another estate No. 2540 on the revenue rolls of the collector of Faridpur and that the defendants were lawfully in possession as lessees under the proprietors of that estate. The defendants further pleaded that the suit was barred by limitation, inasmuch as neither the plaintiffs nor the defendants as their co-sharers had been in occupation of the land as included in estate No. 5557 within 12 years antecedent to the institution of the suit. The court of first instance found upon the questions of title and limitation against the plaintiffs and dismissed the suit. Upon appeal the Subordinate Judge came to the conclusion, first, that the land was included in estate No. 5557 as alleged by the plaintiffs and not in estate No. 2540 as asserted by the defendants, and secondly, that the plaintiffs had been in possession within 12 years of the institution of the suit. The Subordinate Judge accordingly made a decree in favour of the plaintiffs, which entitled them to recover possession to the extent of their $\frac{5}{8}$ ths share jointly with the co-sharer defendants.

On appeal to this court the decree of the Subordinate Judge was assailed principally on two grounds, namely, *first* that the decision was erroneous in respect of the question of title ; and, *secondly*, that even if the question of title was deemed concluded by the decision of the Subordinate Judge the plaintiffs were not entitled to a decree for joint possession of the land. Mr. Justice Mullick has held that the plaintiffs are not entitled to joint possession, and he has placed reliance upon two decisions of the Judicial

Committee, namely, *Watson & Co. v. Ram Chund Dutt* (1) and *Lachmeswar Singh v. Manowar Hossein* (2).

This decision has now been assailed on behalf of the appellants upon two grounds, namely, *first* that the defendants should not be allowed, at this stage of the case, to fall back upon their position as co-sharers and to defeat the claim for joint possession of the land on the ground that they were entitled as co-sharers to take exclusive possession of the disputed land; and, *secondly* that even if the defendants be permitted to rely upon their status as co-sharers, the decisions mentioned are of no assistance to them. In my opinion, these contentions are well-founded.

It is plain that the defendants, even in their appeal to this Court, sought to maintain the position that they had entered upon the land as lessees under the proprietors of the estate No. 2540. It was not until after they had failed upon that point, that they turned round and relied upon their position as co-sharers of the plaintiffs in respect of estate No. 5557. Now, the rule laid down by the Judicial Committee in *Watson & Co. v. Ram Chand Dutt* (1) which is a rule of justice, equity and good conscience, must be applied with reference to the circumstances of the individual case before the Court. *Prima facie*, co-owners are entitled to hold joint possession of joint property. Consequently, if one co-sharer seeks to defeat the claim of another co-sharer to joint possession of joint property, special circumstances must be alleged and established so as to justify exclusive occupation of the joint property by one of the co-owners. No foundation for such a case has been laid in the pleadings, in the issues or in the evidence. The Court cannot now—after the matter has been fought for over ten years, upon entirely different lines—allow the defendants to make a new case, wholly inconsistent with what they had made before and to have a remand and retrial. Besides, it is perfectly plain, upon the admitted facts of this case that the defendants cannot possibly resist the claim for joint possession. The principle deducible from the cases is that a co-sharer who has been ousted from joint property is entitled to recover joint possession: *Mahesh Narain v. Nawbut* (3); *Lokenath v. Dhakeswar* (4). In the present case there is no room for doubt that the plaintiffs were ousted by the defendants. No other effect

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(1) (1890) I. L. R. 18 Calc. 10; I. R. 17 I. A. 110.

(2) (1891) I. L. R. 19 Calc. 253; I. R. 19 I. A. 48.

(3) (1905) 1 C. L. J. 437; I. L. R. 32 Calc. 837.

(4) (1914) 21 C. L. J. 253.

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can possibly be attributed to the acceptance by the contesting defendants of a lease of the disputed land from an adverse claimant and to their entry upon the land in assertion of the title so derived from the adverse claimant : *Biseswar v. Bhagabati* (1). Reliance has been placed, however, upon a passage from the judgment of the Judicial Committee in *Lachmeswar Singh v. Manowar Hossein* (2) to show that the mere fact that a co-owner has set up an adverse title in himself does not disentitle him to the benefit of his position as a co-sharer. That case is clearly distinguishable on the ground that there the co-owner had not been excluded from the enjoyment of the joint property. In the case before us, on the other hand, the plaintiffs have been excluded from the enjoyment of the joint property by the defendants in assertion of a hostile title. To constitute ouster, a physical eviction is not essential ; if a co-owner is in possession on behalf of or under an adverse claimant under such circumstances as to evidence a claim of exclusive right and title and a denial of the rights of the other co-owners, there is an ouster in law. When a co-owner accepts, as here, a deed of the whole property from one who has no title, and claims and exercises the rights of sole ownership under a denial of any other persons' right in the premises, he is obviously in adverse possession to the exclusion of his co-sharers. In these circumstances, the plaintiffs are clearly entitled to a decree for joint possession.

In my opinion the judgment of Mr. Justice Mullick is erroneous and cannot be supported ; his decree must accordingly be reversed and that of the Subordinate Judge restored with costs.

A. N. R. C.

Appeal allowed.

(1) (1915) 24 C. L.J. 38.

(2) (1891) 19 Calc. 253.

*Before Sir John Woodroffe, Knight, Judge, Mr. Justice D. Chatterjee
and Mr. Justice Newbould.*

SATIS CHANDRA MITRA

v.

JOGENDRA NATH MOHALANABIS AND OTHERS.

Mortgage—Suit on a mortgage bond—Indian Evidence Act (I of 1872) sections 68, 69, 70—Admission of execution by the sole mortgagor—Proof of attestation, if necessary, as against other parties not admitting execution.

Per Woodroffe and D. Chatterjee, JJ. (Newbould J. contra)—In a suit on a mortgage bond, the admission of execution by the sole mortgagor does not dispense with the necessity of complying with the provisions of section 68 of the Evidence Act, in order to prove the execution of the document as against other parties in the suit who do not admit such execution.

Appeal by the plaintiff.

The suit was upon a mortgage bond. The defendant No. 1 was the executant of the mortgage and the other defendants derived title to the mortgaged property subsequently by execution and certificate sales. The defendant No. 1, the executant, admitted the mortgage-deed and the 1st Court gave decree on the basis of the mortgage. Upon appeal, the Subordinate Judge remanded the case holding that the document had not been proved by the examination of any of the attesting witnesses as required by section 68, Indian Evidence Act. The plaintiff appealed to the High Court.

Babu Surendra Kumar Bose for the Appellant.

Babu Asita Ranjan Ghosh for the Respondents.

The appeal was originally heard on the 5th May, 1916, by Mr. Justice D. Chatterjee and Mr. Justice Newbould who recorded the following opinions :

D. Chatterjee, J.—This was a suit upon a mortgage-bond. The defendant No. 1 was the executant of the mortgage and the other defendants derived title to the mortgaged property subsequently by execution and certificate sales. The defendant No. 1, executant of the document, admitted the mortgage-deed and the 1st Court gave a decree on the basis of the mortgage.

It appears that defendants Nos. 3 to 5 made an attempt to have the case postponed for the purpose of getting an order of transfer of

* Appeal from Appellate Order No. 56 of 1915, against the order of Babu Debendra Prosad Bagchi, Subordinate Judge, 1st Court of Faridpur, dated the 14th January, 1915, reversing the order of Babu Monmohun Neogi, Munsiff of Faridpur, dated the 18th March, 1914.

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the case to the Court of the Subordinate Judge for trial with another suit in the same matter. Before the order of the District Judge on the application for transfer was recorded the case was disposed of by the learned Munsiff. Upon appeal, the learned Subordinate Judge remanded the case holding that the document, that is, the mortgage-deed, had not been proved by the examination of any of the attesting witnesses as required by section 68 of the Evidence Act.

On appeal, it is contended before us that the order of the learned Judge below is wrong, in that section 70 of the Evidence Act provides that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested and that therefore it was not necessary to prove the attestation of the document.

It is contended by the learned Vakil for the respondents, however, that an admission of the execution by the executant has the effect of proving the document as against the party making the admission and not as against them; and as they stated in the written statement that the document was not executed in accordance with law, the document ought to have been proved, so far as they are concerned, in accordance with the general provisions of section 68.

Section 68 provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. Section 69 provides for cases where no attesting witness can be found. Section 70 says that if a person who has executed a document admits the execution, then that will be taken as sufficient proof of its execution as against him *i.e.*, the person making the admission. Section 70, therefore, seems to be an exception to the general rule contained in section 68. This exception must be read by the light of the words used in it and, so reading the section, the meaning seems to be that an examination of an attesting witness will not be necessary for the purpose of proving the execution if the executant admits that he has executed the document; but this proof must be considered as confined in its operation only to the person making the admission. If that be so, the defendants Nos. 3, 4 and 5 who do not admit the execution of the document cannot be said to be bound by the sufficiency of the proof of the execution supplied by the admission

of the executant. This contention of the learned Vakil for the respondent seems to be supported by principle also. The defendant No. 1, I take it, executed the mortgage and thereafter he made sales in favour of the respondents, or the respondents derived title to his right, title and interest existing after the execution of the mortgage. If it were to be held that the respondents were bound by the admission made by the executant subsequent to their acquisition of title, it would be sinning against the law of admissions; because in that case, the executant of the document would be making a derogation from his own grant by making an admission to the detriment of persons deriving title from, or through, him before the admission.

In this view of the case, I think that the lower appellate court was right in sending the case back for the formal proof of the document as against defendants Nos. 3, 4 and 5 who did not admit the execution of the document. I would, therefore, dismiss this appeal with costs.

As there has been a difference of opinion in this case, it will be placed before the Hon'ble the Chief Justice so that it may be referred to a third Judge. The point on which the court has differed, is whether in a suit on a mortgage bond, the admission of execution by the sole mortgagor is sufficient to render it unnecessary for the mortgagee to comply with the provisions of section 68 of the Evidence Act in order to prove the execution of the document as against subsequent transferees of the mortgaged property who do not admit the execution; or, must the execution be formally proved against them.

Newbould J.—In this case, I regret that I am unable to agree with my learned brother. We are, I think, agreed that section 70 of the Evidence Act must be read by way of proviso to section 68. From this it appears to me to follow that an admission by the sole executant of an attested document of its execution by himself dispenses with the necessity to call an attesting witness under section 68 for the purpose of proving its execution. There is a marked difference in the language used in the two sections 68 and 70. Section 68 speaks of the document being 'used as evidence,' section 70 of its being 'proved.' Under section 70 and even apart from it, the admission of a party to an attested document cannot prove it against a person who is not a party to it. But I see no reason why such admission should not render the document admissible in evidence against him. The admission does not prove the document against him: but it is sufficient to prevent his taking the technical

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plea that the provisions of section 68 have not been complied with.

I am aware that a contrary view was expressed by a Divisional Bench of this Court in *Jogendranath v. Nitai Churn* (1). But this is only an *obiter dictum* as the document there in question was held to have been proved to be duly attested on other grounds. The correctness of the view taken by the learned Judges who decided this case has been doubted in Amir Ali and Woodroffe's "Law of Evidence," 5th edition, page 506, where it is stated, "if the admission of the executant has not the effect of dispensing with proof of attestation, there was no necessity for the section at all, as recourse may be had to the general provisions of the Act relating to admission, the admission of execution is to be used only in the sense of an admission of signing only."

It therefore seems to me that section 68 must be read subject to the provisions of subsequent sections; and where an executant admits execution of an attested document, the document can be used as evidence against other parties to the suit and proved in the ordinary way without it being necessary to call, or prove the handwriting of, an attesting witness.

I would therefore, decree the appeal and set aside the order of the learned Subordinate Judge remanding the case for a fresh trial and direct him to dispose of the appeal on the evidence on the record.

Their lordships having differed the appeal was referred to Mr. Justice Woodroffe under section 98, read with section 108, of the Civil Procedure Code.

Accordingly the appeal was heard by Woodroffe J. on the 22nd May, 1916.

Babus Bepin Behary Ghose and *Surendra Kumar Bose* for the Appellant.

Dr. Sarat Chandra Bysak and *Babu Asita Ranjan Ghose* for the Respondents.

C. A. V.

The following judgment was delivered by

Woodroffe, J.—In the case of a document required by law to be attested the admission of a party to it of its execution by himself is under section 70 of the Evidence Act sufficient proof of its execution as against him. If therefore the question had arisen solely between the plaintiff and the mortgagor in this case it would not have been necessary to have called any attesting witnesses or

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other evidence. The admission by the party to the document would have dispensed with the necessity of all further proof. In the present case, however, there are other defendants than the mortgagor. The learned pleader who appears on behalf of the plaintiff admits that the admission of the mortgagor is not evidence against his co-defendants and that it will therefore be necessary for him to prove by evidence affecting those co-defendants that the mortgage was executed and operative. He however contends that the effect of the admission by the executor is to dispense him from proof in a particular form namely by calling an attesting witness. He contends that the effect of sections 68 to 72 of the Evidence Act is that where there are several defendants against whom a mortgage is sought to be proved and one of the defendants being the executant of the document admits execution, that admission whilst not dispensing with the necessity of proof of the mortgage as against the defendants other than the executant, does dispense with the necessity of calling an attesting witness. I am, however, unable to agree with this contention. The effect of section 70 is in my opinion that the proof by calling attesting witnesses is dispensed with where the party executant admits execution only as against him and that where there are other defendants than the party making such admission the document is not admissible in evidence as against them until it has been proved by attesting witness in the manner prescribed by the Act. It is the common practice that a document is admitted against a particular party only or for a particular purpose and not as against other parties or for other purposes. In the case before me it is in my opinion necessary not only to prove the document as against the defendants other than the admitting executant but to prove it in the way required by sections 68 and 69, namely the production of an attesting witness. The admission of the executing party has no effect at all except as regards the party himself. As regards others, the position is just the same as if there had been no such admission; that is, the case must be proved against them in the way required by those sections. The decisions in the case of *Jogendra Nath Mukhopadhyaya v. Nitai Churn Bandopadhyaya* (1), does not touch the matter before us, for there the question was not as to the effect of an admission by an executant upon the question of the proof required against parties other than the executant; nor does the passage cited from the text book quoted in Mr. Justice Newbould's judgment refer to the matter now in issue, but to the

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point which appears to have been raised by the decision in *Jogendra v. Nitai* (1). That decision is open to this construction that even when the executant admits execution, his admission is proof of execution or signing only and does not dispense with proof of attestation. If this be the meaning of that judgment I am unable to agree with it as I think that the admission of the executant has the effect of dispensing with the proof of attestation as against him. For if the admission of execution is to be understood only in the sense of an admission of signing, then there was no necessity of section 70 at all regard being had to the general provisions of the Evidence Act relating to admissions. This is also indicated by the last words of section 70 "though it be a document required by law to be attested." I therefore agree with the conclusion of Mr. Justice Chatterjee that in a suit on a mortgage bond the admission of execution by the sole mortgagor does not dispense with the necessity of complying with the provisions of section 68 of the Evidence Act, in order to prove the execution of the document as against other parties in the suit who do not admit such execution. I think that a document must be proved as against them in accordance with the provisions of sections 68, 69 and 71 of the Evidence Act.

I therefore dismiss this appeal with costs, three gold mohurs each hearing.

D. K. R.

Appeal dismissed.

(1) (1903) 7 C. W. N. 384.

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May, 16.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

BIDHUMUKHI CHOWDHURANI

v.

ASMATULLA AND OTHERS. *

Bengal Tenancy Act (VIII of 1885), section 160 cl. (g)—"Protected interest"—"Express permission"—Permission at the time of creation of each sub-tenancy, if necessary—General permission, if sufficient.

* Letters Patent Appeal, No. 57 of 1914, against the decision of Mr. Justice B. K. Mullick, dated the 28th April, 1914, in Appeal from Appellate Decree, No. 939 of 1912, against the decree of Mr. Raj Krishna Banerjee, District Judge of Rungpur, dated the 26th July, 1912, affirming that of Babu Bepiu Chunder Chatterjee, Munsiff, 2nd Court, Rungpur, dated the 19th June, 1911.

Section 160 cl. (g) of the Bengal Tenancy Act does not contemplate that the tenant should come each time to his landlord and ask him for express authority in writing, authorising the specific interest which the tenant intends to create. A permission to create an interest of a particular description given in the lease granted by the landlord, is sufficient for the purposes of section 160 cl. (g) of the Act.

A deed by which a *darputni* was created contained the following words :—
“ I give you a right to alienate the land at pleasure by gift and sale, and to grant *sepatni* by settlements of your own interest :”

Held, that the words were sufficient to authorise the creation of a sub-tenancy within the meaning of section 160 cl. (g) of the Bengal Tenancy Act, and as such a *sepatni* created by the *darpatnidar* was a “protected interest” not liable to be annulled under the Act.

Afazuddi Khan v. Prasanna Gain (1) and *Krista Das Laha v. Jotindra Nath Basu* (2) distinguished.

Appeal by the plaintiff, Bidhumukhi Chowdhurani.

A *darputni* was created by the *putnidar* in favour of one Manulla ; and this *darputni* subsequently vested in equal shares in three persons, Bhairab, Nil Chand and Juggomohan. Juggomohan then gave a *sepatni* settlement of his one-third share in the *darputni* to Bhairab, both on behalf of himself and as executor to the estate of Nil Chand, deceased. Plaintiff purchased the *darputni* tenure at a sale held in execution of a decree for its own arrears obtained by the *putnidar* ; and thereupon gave a notice under section 167 of the Bengal Tenancy Act to Bhairab for annulment of the *sepatni* interest created by Juggomohan. Plaintiff brought this suit for recovery of rent from the defendants, the cultivators in actual occupation of the land.

Defence *inter alia* was, that the rent was payable not to the plaintiff but to Bhairab, the *sepatnidar*, whose interest was in force as it was “protected”, and could not be annulled.

It appears that the patta by which the *darputni* was created expressly stated that the *darputnidar* might grant *sepatni* settlements ; and the point for decision in the case was whether the *sepatni* interest created by the *darputnidar* by virtue of the authority vested in him by the aforesaid patta, was a “protected interest” within the meaning of clause (g) of section 160 of the Bengal Tenancy Act.

Dr. Rash Behary Ghose and *Babus Dwarka Nath Chuckerbutty* and *Bimal Chandra Das Gupta* for the Appellant.

Babus Sarat Chandra Roy Chowdhury and *Biraj Mohan Mojumdar* for the Respondents.

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April, 25.

The following judgment was delivered by

Mullick J.—One Lachmipat, the owner of a *putni* talook granted a *darputni* to Manulla. This *darputni* vested in equal shares in three persons named Bhairab, Nil Chand and Juggomohan. Nil Chand died and his estate passed into the possession of Bhairab as executor. Juggomohan gave a *sepatni* settlement of his one third share in the *darpatni* to Bhairab acting both on behalf of himself and as executor of the estate of Nil Chand. The plaintiff has, by purchase at a sale for arrears of rent, become sixteen anna proprietor of the *darputni*. He states that he has by notice under section 167 of the Bengal Tenancy Act annulled the encumbrance created by the *sepatni* and that therefore the defendants who are tenants upon the land are liable to pay the whole rent to him. The lower appellate Court has dismissed the suit. Hence this second appeal.

The main contention is that the *sepatni* is not a protected interest within the meaning of section 160 (g) Bengal Tenancy Act. Now the *patta* by which the *darputni* was created expressly states that the *dar-putnidar* may grant *sepatni* settlements, but it is argued that a general permission, though in writing, is not sufficient and that what is required is a special permission in each case. I cannot see any reason why we should import into the statute something more than what is there. All that it requires is that the permission of the proprietor should be express and that it should be in writing. These requirements are fulfilled in the present case and therefore the *sepatni* is a protected interest within the meaning of the Bengal Tenancy Act. The learned Vakil for the respondent wishes to go further and argues that whereas section 11 of Regulation VIII of 1819 requires special permission in each case, section 160 (g) of the Bengal Tenancy Act is less strict. It is not necessary for the purpose of the present case to enter into a discussion as to whether the intention of section 160 (g) was to enlarge the powers of encumbrancers, but if it were necessary to decide the point I would say that the scope of section 160 (g) was identical with that of section 11, Regulation VIII of 1819. By section 105 of Act X, 1859 a *putni* talook could be brought to sale for its arrears "according to the rules for the sale of under-tenures contained in any law for the time being in force." It was held by the Privy Council that a sale held under section 105, Act X, 1859 of a Putni talook for its arrears had the effect of avoiding all encumbrances. By section 16, Act VIII (B. C.) 1865 the legislation gave more formal effect to this decision and showed that its intention was to protect the same encumbrances as section 11, Regulation VIII, 1819. It is important to note that section 16,

Act VIII, 1865 avoids all encumbrances "unless the right of making such encumbrances shall have been expressly vested in the holder by the written engagement under which the under-tenure was created, or by the subsequent written authority of the person who created it." This clearly covers a general authority in writing. Now section 160, Act VIII, 1885 differs from section 16, Act VIII (B. C.) 1865 only in form and I am satisfied that under the present law a general authority, such as is contained in the *darputni* patta under consideration, is sufficient to protect the *sepatni*. Therefore as regards the one-third share of Juggomohan leased in *sepatni* to Bhairab the tenants are bound to pay rent not to the plaintiff but to Bhairab. With regard to the remaining two-thirds share either the plaintiff must show separate collection or he must sue for the whole rent making Bhairab a party. It is found as a fact that he has failed to show separate collection and it is admitted that Bhairab is not a party to the present suit. The whole suit has therefore been rightly dismissed. The appeal is dismissed with costs.

Against this decision the plaintiff appealed under section 15 of the Letters Patent.

Babu Bimal Chandra Das Gupta for the Appellant.

Babus Sarat Chandra Roy Chowdhury and *Atul Chandra Gupta* for the Respondents.

The following judgments were delivered :

Sanderson, C. J.—In my judgment this case raises a point of some interest.

It appears that on the 30th of April 1906, the zemindar Maharajah who was the Putnidar got a decree for *darputni* rent, and the result of that was that on the 25th of January, 1907, the plaintiff at the execution sale which was held under the decree, purchased the *darputni* interest, and thereupon, the plaintiff gave a notice under section 167 of the Bengal Tenancy Act to Bhairab, with reference to the *sepatni* interest which was in him at that time. That *sepatni* estate had been created by Juggomohan in the year 1886.

Now, the suit was brought in this case by the plaintiff against the defendants, the occupancy-holders, for rent. They set up the defence that the plaintiff was not entitled to sue for rent, the first ground for that defence being that the *sepatni* interest which was in Bhairab had not in fact been put an end to, and the reason why they said it was not put an end to, was that it was a "protected

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interest" within the meaning of section 160, clause (g) of the Bengal Tenancy Act which runs as follows "any right or interest which the landlord at whose instance the tenure or holding is sold, or his predecessor in title, has expressly and in writing given the tenant for the time being permission to create:" the landlord in question in this case being Lachmiput or his successor in title namely, the zemindar Maharajah, the Putnidar, to whom I have already made reference.

Now, the deed upon which this question depends, made between Lachmiput and one Manulla Shah is set out at page 11 of the paper book, and in that deed, the *landlord*, using the word as used in the section, granted a lease to Manulla, and after describing the *land* and the boundaries proceeded as follows:—I give you "right to alienate the same at pleasure by gift and sale, and to grant *sepatni* &c., settlements of your own interest." The first question raised in this appeal is whether those words used in that document bring this case within clause (g) of section 160 of the Bengal Tenancy Act: or, in other words, has the landlord by the words which I have quoted, expressly and in writing given the tenant for the time being, permission to create the particular interest *vis.*, the *sepatni*. In my judgment the landlord has done so. The words used are first of all general; and, they give the tenant a right to alienate the same at pleasure by gift and sale; and, then they go on to specify this particular kind of interest, "to grant *sepatni* &c., settlements of their own interest." In my judgment this case is not governed by either of the two cases which have been cited to us, namely, *Afazuddi Khan v. Prasanna Gain* (1), and *Krista Das Laha v. Jotindra Nath Basu* (2). The former of the two cases namely, *Afazuddi Khan v. Prosonna Gain* (1) in which the judgment was given by the late Chief Justice and Mr. Justice Digambar Chatterjee to my mind, is of some assistance to us in coming to a conclusion in this case, because in that case the words were far more general than they are in the case now before us; the particular interest which was there created was not specified, whereas in this case the specific interest which was created by the tenant, namely, the *sepatni* was mentioned in the deed, and express authority in writing was given by the landlord to create such interest.

It was argued, that in order to come within clause (g) of section 160, it was necessary for the landlord to specify the particular interest which the tenant was to create, giving, I suppose, the name of the person in whom the interest was to be vested. I cannot think

that that was the meaning of the Act. It does not say so : and, if that were the meaning I can imagine all kinds of difficulties arising ; I do not think the section contemplated that the tenant had to come each time to the landlord and ask him for express authority in writing, authorizing the specific interest which the tenant intended to create. I think that the words in the deed were sufficient to authorize the creation of the sub-tenancy which was created by Juggomohan in favour of Bhairab. Therefore, the first point taken on behalf of the defendants was a good one.

Then it is said that even if this was a good point, the plaintiff was entitled to $\frac{2}{3}$ rd of the rent even if the other $\frac{1}{3}$ rd was to be paid to Bhairab. But this is quite inconsistent with the claim which was originally made in this case, and I do not think it would be right to deal with this matter on the fresh case which has now been made : and, I think that the judgment of Mr. Justice Mullick was right and the appeal from his judgment should be dismissed with costs.

Mookerjee, J.—The facts, material for the determination of the interesting question of law raised in this appeal, are not in controversy and may be briefly stated. On the 25th January, 1907, the plaintiff purchased a *darputni* tenure at a sale held in execution of a decree for its own arrears obtained by the *putnidar* on the 30th April, 1906. On the 14th April, 1910, she instituted this suit for recovery of arrears of rent from the cultivators in actual occupation of the land. They pleaded that the rent was payable, not to her, but to a *sepatnidar* whose interest was still in force. The plaintiff replied that the *sepatni* interest was an encumbrance and had been annulled at her instance by service of notice in accordance with section 167 of the Bengal Tenancy Act. The question thus arises for decision, whether the *sepatni* interest was, as alleged by the plaintiff, an encumbrance capable of annulment under section 167, or, as asserted by the defendants, a "protected interest" within the meaning of clause (g) of section 160. Now, that clause provides that "any right or interest which the landlord, at whose instance the tenure or holding is sold or his predecessor in title, has expressly and in writing given the tenant for the time being permission to create" is a protected interest within the meaning of Chapter XIV of the Bengal Tenancy Act. The point for investigation consequently is, whether the *sepatni* is a right or interest which the *putnidar* at whose instance the *darputni* was brought to sale had expressly and in writing given the *darputnidar* permission to create. The plaintiff appellant has argued that this question should be

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answered in the negative, because section 160 (g) implies that such permission, to be of any avail, must have been expressly given, at the time of the creation of the *sepatni*, by a document specially executed in this behalf,—and no such instrument was admittedly executed in this case. In support of this proposition, reference has been made to the decision in *Krista Das Laha v. Jotindra Nath Basu* (1). Our attention, however, has also been drawn to the decision in *Afazuddi Khan v. Prasanna Gain* (2) which possibly lends support to a different view. Neither of these decisions, however, directly bears upon the question raised before us, although, perhaps, the first of the two cases mentioned, is more analogous than the second to the case now before the Court. As the matter is thus not concluded by authority, section 160 (g) requires to be construed, and I feel no doubt that we should not accept the interpretation put forward on behalf of the appellant, namely, that the express permission must be contained in a written instrument, other than the lease whereby the tenancy was created, which is specially executed when the incumbrance is created. If that had been the intention of the legislature, clause (g) would have been differently framed. There is, I think, no foundation for the contention that an express written permission must be obtained from the landlord on the occasion when the particular encumbrance is created; there is in principle no difference between a permission to create an interest of a particular description, given in the lease itself, and a permission subsequently given by a separate document.

The question next arises whether the *darputni* lease of the 4th June, 1866, did contain an express permission in writing sufficient for the purposes of clause (g). In my opinion, the answer must be in the affirmative, for the document states expressly that the *darputnidar* would have authority to grant a *sepatni*; and it was pursuant to the power thus conferred on the *darputnidar* that he created the *sepatni* on the 21st January, 1886. There is thus no escape from the position that the *sepatni* is a “protected interest” within the meaning of section 160 (g) and has not been annulled, because, it could not be annulled, under the provisions of section 167.

This really concludes the litigation. But as a last resort the argument has been put forward that as the *sepatni* covered only one-third of the property, the plaintiff is entitled to rent in respect of the remaining two-thirds share. The obvious answer is that this

(1) (1912) 16 C. W. N. 561.

(2) (1911) I. L. R. 39 Calc. 138.

was not the case made in the plaint. If such a claim had been put forward, it would have been necessary to determine whether the rent in respect of a two-thirds share had hitherto been collected separately from the rent of the one-third share. This question has not been raised and could not be raised on the pleadings, nor could it be investigated in this suit, in the absence of the *sepatnidar* interested in the one-third share.

On these grounds, I agree that the decree made by Mr. Justice Mullick must be affirmed and this appeal dismissed with costs.

A. N. R. C.

Appeal dismissed

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CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Caspers.

KAILAS CHANDRA MANDAL

v.

KIRANENDU GHOSE.*

*Accounts, suit for—Provincial Small Cause Courts Act, Schedule II, Art 31—
Small Cause Court, jurisdiction of—Suit, nature of.*

A suit for recovery of a certain sum of money on the allegation that upon settlement of accounts the amount would be found due from the defendant, was instituted in the Court of Small Causes :

Held, that it was a suit for accounts within the meaning of Art 31 of the Second Schedule of the Provincial Small Cause Courts Act, and that treated as such it was beyond the jurisdiction of the Court of Small Causes.

Held further, that the true nature of a suit cannot be altered by the form in which the claim is laid in the plaint; the matter is essentially one of substance. If in the order to grant relief to the plaintiff, it is necessary to take accounts, the suit is one for accounts within the meaning of Art 31, although the plaintiff may have chosen to put a definite money-value upon his claim.

Konduru Runga Reddi v. Subbiah Setty (1) distinguished.

Whether a suit is one for accounts within the meaning of Art. 31 must depend upon the relation in which the parties stand to each other, and the nature of the investigation required to afford relief to the plaintiff.

* Civil Rule No. 5398 of 1910 against a decision of Babu Debendra Bijoy Bose, Small Cause Court Judge, Murshidabad, dated the 4th November, 1910.

(1) (1904) I. L. R. 28 Mad. 394.

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Application for revision by the defendant.

Suit for recovery of a certain sum of money on the allegation that upon settlement of accounts that sum would be found due from the defendant.

The material facts and arguments appear from the judgment.

Babu Jadunath Mandal for the Petitioner.

Babu Giris Chandra Pal for the Opposite Party.

The judgment of the court was delivered by

March, 13.

Mookerjee J.—We are invited in this Rule to set aside a decree of the Court below on the ground that it has been made without jurisdiction. The plaintiff opposite party is a silk merchant. The defendant petitioner is an artisan engaged in the business of dyeing and dressing silk. He has been employed by the plaintiff, during many years past, in his professional work. The plaintiff from time to time advanced money to him out of which he spent a portion on materials for dyeing and dressing, and paid himself as remuneration for work done. The plaintiff kept an account-book in which he made entries as to the sums paid out to the defendant as occasion required, and as the defendant supplied articles, the plaintiff also made entries as to the amount which the defendant was entitled to charge on account of labour and materials. The accounts between the parties, however, have not been adjusted. The plaintiff brings this suit for recovery of Rs. 307 on the allegation that upon settlement of accounts that sum would be found due from the defendant. The learned Small Cause Court Judge has treated the suit as one for accounts. He made a preliminary decree on the 23rd September, 1910, and under Order 26, Rule 11 of the Code of 1908 appointed a commissioner to adjust the account from the books produced and other evidence that might be adduced by the parties. The commissioner submitted his report and a decree was made in favour of the plaintiff.

It is now contended on behalf of the defendant that the suit is excluded from the cognizance of the Court of Small Causes by Art 31 of the second schedule of the Provincial Small Cause Courts Act. That Article provides that any suit for account [other than a suit for an account of partnership transactions or a suit for an account of property, which are excluded by Arts. 29 and 30,] cannot be enteritained by a Court of Small Causes. The question, therefore, arises whether this is a suit for account within the meaning of Art. 31. We feel no doubt whatever that it is a suit of that description. The true relation between the parties is that as the defendant has from time to time accepted advances from the plaintiff, it is

his duty to account for the sums received and spent by him. He is bound to show what sums have been spent in the purchase of materials from time to time. He is also entitled to deduct from the funds in his hands the charges for labour. Clearly the determination of the question in controversy between the parties does involve the taking of accounts in the strict sense of the term. It need not be disputed that every suit in which accounts have to be taken is not a suit for accounts within the meaning of Art. 31. In support of this proposition, reference may be made to the case of *Konduru Runga Reddi v. Subbiah Setty* (1). It may also be conceded that, as pointed out by Mr. Justice Trevelyan in *Kunjobehary Singh v. Madhub Chundra Ghose* (2) a suit for account is a suit which seeks for a decree not for a definite sum of money, but ordering the defendant to account to the plaintiff for monies received by him. At the same time, it must be remembered that the true nature of a suit cannot be altered by the form in which the claim is laid in the plaint; the matter is essentially one of substance. If in order to grant relief to the plaintiff, it is necessary to take account, the suit is one for account within the meaning of article 31 although the plaintiff may have chosen to put a definite money value upon his claim. In fact, with a view to determine the jurisdiction of the Court, such money value is invariably put upon the claim by the plaintiff in a suit for account. But whether the suit is one for account within the meaning of article 31, must depend upon the relation in which the parties stand to each other, and the nature of the investigation required to afford relief to the plaintiff. In the case before us, upon the facts stated, there is no room for controversy that the suit is one for account strictly so called and that it has been tried as such by the Subordinate Judge without any objection by the plaintiff in the Court below. But the Subordinate Judge has overlooked that, treated as a suit for account, it was beyond his jurisdiction.

The result therefore is that this Rule must be made absolute and the decree of the Court below set aside. The plaint will be returned to the plaintiff for presentation to the proper Court. The petitioner will have his costs in this Rule. We assess the hearing-fee at two gold mohurs. The costs in the Court below will be costs in the suit.

S. C. R. C.

Rule made absolute.

(1) (1904) I. L. R. 28 Mad. 394.

(2) (1896) I. L. R. 23 Calc. 884 (890).

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CIVIL REFERENCE.

Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice Cuming.

*In the matter of RASIK LAL NAG, A MUKTEAR.**

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2, 27 & July, 4.

Legal Practitioners Act (XVIII of 1879) sections 13, 14—Jurisdiction of Subordinate Courts to take proceedings under the Act—Inquiry by Subordinate Courts if valid—Misconduct in the presence of the Court, effect of—Misconduct, what amounts to—Contempt—Disciplinary action, object of.

Section 14 of the Legal Practitioners Act covers cases of misconduct under all the clauses of section 13 of the Act and as such a Court subordinate to the High Court is competent to enquire into a matter falling within the purview of any of the clauses of section 13, when the legal practitioner whose conduct is called in question practises in such court.

In Re Muhammad Abdul Hai (1) and *District Judge of Kistna v. Hanumanulu* (2) approved.

The dictum of Hill J. in *In the matter of Purna Chandra Pal* (3) commented on and disapproved.

The High Court is competent to take action under section 13 cl. (f) of the Legal Practitioners Act after such enquiry as it thinks fit and it is not required that the enquiry should be conducted directly by the High Court; it may well be made by a Subordinate Court under the direction of the High Court, the only essential being that notice containing the charges should be given to the legal practitioner to shew cause against suspension or dismissal.

In the matter of Ganapati Sastri (4) referred to.

Misconduct in the presence of the Court which shews disrespect of its authority or which obstructs or has a tendency to interfere with the due administration of justice is contempt and thus disorderly conduct in the Court room is treated as contempt of Court. The Court is deemed present in every part of the place set apart for its use and for the use of its officers, jurors and witnesses and consequently misbehaviour in such places is misconduct in the presence of the Court.

Trench v. Trench (5) referred to.

A contempt may be of such a character as to warrant the exercise of the disciplinary powers of the Court.

Held, therefore, that the legal practitioner in the present case having used abusive language to an officer of the Court, and the same having been heard by the presiding Judge himself who was holding his Court in the room adjoining the office where the incident took place, misbehaved in the presence of the Court within the meaning of this Rule and as such the Court could take disciplinary action against him.

* Civil Reference No. 11 of 1916 under the Legal Practitioners Act by Babu Kumud Nath Ray, Munsiff of Kusteia through J. C. H. MacNair Esq. District Judge, Nadia, dated the 26th February 1916.

(1) (1906) I. L. R. 29 All. 61.

(2) (1915) 18 M. L. T. 549.

(3) (1899) I. L. R. 27 Calc. 1023.

(4) (1909) 19 M. L. J. 504.

(5) (1824) 1 Hogan 138.

Where the Court takes notice of a misconduct which consists in the obstruction of or an interference with one of its officers, the object of the discipline enforced is not so much to vindicate the dignity of the Court or the person of the officer as to prevent undue interference with the administration of justice.

Helmere v. Smith (1) relied on.

Reference under section 14 of the Legal Practitioners Act.

The material facts will appear from the judgment.

Babus Debendra Nath Bagchi, Mohini Mohan Chatterjee and Baranasibasi Mookerjee for the Muktear.

Babu Ram Churn Mitra, Senior Government Pleader for the Government.

C. A. V.

The judgment of the Court was delivered by

Mookerjee J.—This is a report, made under section 14 of the Legal Practitioners Act, by the Munsiff of Kustea through the District Judge of Nadia. The Munsiff has recommended disciplinary action against Rasiklal Nag, a Mukhtear, practising in his Court, and, the District Judge has in his opinion endorsed the views of the Munsiff. The circumstances which led the Munsiff to take action under section 14 may be briefly stated.

On the 7th January 1916, Kisorilal Chatterjee, Accountant in the office of the Munsiff of Kustea, reported that while he was busy with his work in his office-room, the Mukhtear, Rasiklal Nag, interrupted him, seriously threatened him, and, when asked to keep quiet, vilely abused him. The Munsiff, who held his Court in an adjoining room, had himself heard the altercation. He, accordingly, issued a notice on the Mukhtear under section 14, which set out the substance of the charge and called upon him to show cause why disciplinary action should not be taken against him for grossly improper conduct towards an officer of the Court. The Mukhtear entered appearance and contested the allegations of the Accountant. The result was an elaborate enquiry by the Munsiff, which led him to the conclusion that the conduct of the Mukhtear had been highly improper and merited severe condemnation. It appears that the Mukhtear, along with two other persons, was a litigant in a case in that very Court. A sum of Rs. 15-4-0 deposited in the Sub-Treasury at Kustea was jointly payable to them. The payment order-form was passed by the Accountant on the 22nd December 1915, and, under the Rules of Court, was to remain in force for a period of 10 days. The pleader employed by the parties did not, however,

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withdraw the money within the prescribed time. The result was that when, on the 7th January 1916, the Mukhtear accompanied by his pleader and clerk went to receive payment, they were informed that the payment-order had lapsed, and that it would be necessary to apply for its renewal. This appears to have annoyed the Mukhtear, and an altercation ensued between him and the Accountant. The evidence recorded in these proceedings shows that the Mukhtear abused the Accountant and the latter, not unnaturally, retaliated. It is extremely difficult, if not practically impossible, to allocate the blame precisely between the two contestants, but the Munsiff, whose opinion is accepted by the District Judge, holds that the Mukhtear was the aggressor. It is plain, however, that the Accountant had not much of a reputation for civility of manners, and, on one occasion, had struck a blow to the clerk of a pleader, which incident had not been forgotten. His attitude towards the Mukhtear, so far as one can gather from the evidence, was, in view of his antecedents, not very re-assuring. The parties, on this occasion, did not, however, actually come to blows; there was abundance of mutual abuse and re-crimination, and when the Sherestadar threatened to call in the office peon to put the Mukhtear out, the latter, in the words of the Munsiff, "marched out of his own accord." In these circumstances, the Munsiff, as also the District Judge, recommend that "punishment of an exemplary character would be very salutary and very well deserved."

On behalf of the Mukhtear, a preliminary objection has been taken to the validity of the reference on the ground that the Munsiff was not competent to take action under section 14, as the latter section is limited in its application to cases covered by section 13, clauses (a) and (b). In support of this view, reference has been made to the dictum of Hill J. in the case of *In re Purna Chandra Pal* (1). In that case, Hill, J. relied upon the judgment of Lord Hannen in *In the matter of Southekal Krishna Rao* (2), where section 14 was read by the Judicial Committee along with section 13, and it was ruled that the expression "charged with any such misconduct" in section 14 referred back to the preceding section and was consequently limited to "misconduct in the discharge of professional duty." Hill J., however, overlooked that section 13 had been amended after the decision of the Judicial Committee and that whereas in 1883 (the date of the order under review by the Judicial Committee) section 13 comprised a paragraph which

(1) (1899) I. L. R. 27 Calc. 1023; 4 C. W. N. 389.

(2) (1887) L. R. 14 I. A. 154; I. L. R. 15 Calc. 151.

corresponds to what is now included in clauses (a) and (b), before 1899 (the date of the order under review by Hill J.) that is, by section 2 of Act XI of 1896, a new and extended section 13, which comprises clauses (c), (d) and (e) not included in the original section 13, had been introduced by the Legislature into the Legal Practitioners Act, in supersession of the section in its primary form. Consequently, the question now before us, namely, whether the expression "such misconduct as aforesaid" in section 14 is restricted to "fraudulent or grossly improper conduct in the discharge of his professional duty," or is comprehensive enough to cover all cases of misconduct whether they be included in clause (b) or in one or more of the other clauses (c), (d), (e) and (f), never arose before the Judicial Committee. On the other hand, the judgment of the Full Bench in *Le Mesurier v. Wajid Hossain* (1) shows that conduct comprised in the clauses other than clauses (a) and (b) may also be properly described as misconduct; indeed, it was suggested by Rampini and Gupta, JJ. in the order of reference that the expression "any other reasonable cause" in section 13 (f) may be paraphrased as "any kind of misconduct other than the professional misconduct specified in the preceding clauses." We are of opinion that the question cannot be treated as concluded either by the observation of Lord Hannen in *In the matter of Southekal Krishna Rao* (2) or by the dictum of Hill J. in *In the matter of Purna Chandra Pal* (3). We also find that the dictum of Hill J. has been doubted in *In the matter of Kali Prasanna Chaudhury* (4) and *In the matter of two second-grade Pleaders* (5). We further find that Sir George Knox, J. dissented from the view of Hill J. in the case of *In re Muhammad Abdul Hai* (6), and held that the words "any such misconduct as aforesaid," as used in section 14, relate to all the cases set out in section 13; in other words, a subordinate Court is competent to enquire into a matter falling within the purview of any of the clauses of section 13, when the pleader or Mukhtear whose conduct is called in question practises in such Court. This view is not opposed to the decision in *In re Radha Charan Chakrabarti* (7) where although the dictum of Hill, J. was quoted, the only question for determination was the competency of one subordinate Court to investigate a charge of misconduct committed in another subordinate Court, specially, during the pendency of proceedings under section

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(1) (1902) I. L. R. 29 Calc. 890.

(2) (1887) I. L. R. 15 Calc. 152.

(3) (1899) I. L. R. 27 Calc. 1023.

(4) (1910) 11 C. L. J. 164.

(5) (1910) L. R. 34 Mad. 29 (34).

(6) (1906) I. L. R. 29 All. 61.

(7) (1906) 4 C. L. J. 229.

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14 in the latter Court ; a careful scrutiny of the judgment shows that it does not deal with the question in controversy before us. Nor can the decision in *In the matter of Gholab Khan* (1), which turned upon the construction of sections 15 and 16 of Act XX of 1865, be treated as binding authority on the question of the true scope of sections 13 and 14 of Act XVIII of 1879 as amended by Act XI of 1896. That question was recently considered by a Full Bench of the Madras High Court in the case of *District Judge of Kistna v. Hanumanulu* (2), and the construction was adopted that section 14 covers all the clauses of section 13, so that a subordinate Court is competent to take proceedings against a legal practitioner for misconduct alleged to come within clause (f) of section 13. We agree with Sir John Wallis, C. J. that there is no good reason why charges, under clauses other than clauses (a) and (b) of section 13, should not be investigated in the first instance by the subordinate Court, and it would be very inconvenient if they could not. The introduction of clauses (c) (d) & (e) into section 13, without any amendment of section 14, goes rather to show, as observed by Ghose J. in *In the matter of Purna Chandra Pal* (3), that section 14, as it stood, was deemed wide enough to cover them. The court would be slow to presume that the Legislature had overlooked the point and had through oversight left a lacuna which must lead to serious practical inconvenience. If the narrow construction indicated by Hill J. be adopted, the result follows that, while in cases of misconduct comprised in clauses (a) and (b) of section 13, the subordinate Court may forthwith institute an enquiry under section 14, and may, if necessary, exercise the power of suspension at the appropriate stage [*In the matter of Bajrangi Sahay*, (4)] the subordinate Court may be helpless in cases of a much graver character, for instance, where a practitioner is guilty of extremely contumacious conduct in Court. Sections 13 & 14 were intended, in our opinion, to cover the same ground, in so far as the character of the misconduct is concerned. If the misconduct is brought or comes to the notice of High Court without the intervention of the subordinate Court, the High Court is competent to take direct action under section 13 ; if section 14 had stood by itself, the result would have been that the High Court would be powerless to take disciplinary action, where the subordinate Court had, by reason of weakness, ignorance, or like cause, failed to take notice of the misconduct and to report the matter to the High Court

(1) (1871) 7 B. L. R. 179.

(2) (1915) 18 M. L. T. 549 ; (1915) M. W. N. 1050.

(3) (1899) I. L. R. 27 Calc. 1023 (1028).

(4) (1911) 15 C. W. N. 269.

under section 14. A good illustration is afforded by the decision of the Full Bench in *In the matter of an Advocate, a Vakil, a Pleader and a Mukhtear* (1), where the misconduct, committed in the court below and ignored by that court, was noticed by this Court in the course of the hearing of an appeal from Original Order. Section 14, on the other hand, invests the Subordinate Court with authority to institute an enquiry, if, in its opinion, such misconduct has been committed as deserves investigation by that Court. From this point of view, the two sections supplement each other; but the cardinal fact remains that whether the enquiry is made by or under the orders of the High Court under section 13 or is instituted by the subordinate Court of its own motion, the final order can be passed only by the High Court. In fact, sections 12 to 15 show that the final determination in all these cases rests with the High Court and the High Court alone. We hold accordingly that the decisions in *In the matter of Mahammad Abdul Husi* (2) and *District Judge of Kistna v. Hanumanulu* (3) take a correct view of the intention of the Legislature and that section 14 covers cases of misconduct under all the clauses of section 13. In this view, the objection that the Munsiff had no jurisdiction to take proceedings against the practitioner in respect of misconduct alleged to come within clause (f) of section 13, must be overruled. We desire to add however, that, even if we had felt constrained to adopt the restricted view taken by Hill, J, the Mukhtear would not have been benefited in the least degree. It cannot be disputed that this court is competent to take action under section 13, clause (f), after such enquiry as it thinks fit. The section does not require that the enquiry should be conducted directly by the High Court; the enquiry may well be made by a subordinate Court under the direction of the High Court. The only essential is, as pointed out by the Full Bench in *In the matter of Ganapati Sastri* (4), that notice must be given to the legal practitioner concerned to show cause against suspension or dismissal, and the notice must formulate the charges with great particularity and precision so as to enable the practitioner to know the charges he is called upon to meet. That condition has been amply fulfilled in this case. There is thus no reason, why the enquiry by the Munsiff, though not conducted under the orders of this Court, should not be adopted for the purposes of a proceeding under section 13, if we took the view that this court could proceed only under section 13 and not on a report by the subordinate Court

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(1) (1901) 4 C. L. J. 262.

(2) (1906) I. L. R. 29 All. 61.

(3) (1915) 18 M. L. T. 540.

(4) (1909) 19 M. L. J. 504.

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under section 14. We must consequently examine the case on the merits.

The misconduct imputed to the Mukhtear technically amounted to a contempt of Court. It is well settled that misconduct in the presence of the Court, which shows disrespect of its authority or which obstructs or has a tendency to interfere with the due administration of justice, is contempt. On this ground, disorderly conduct in the Court-room is treated as contempt of Court. This principle is not limited to misconduct in the actual presence of the Judge; the Court is deemed present in every part of the place set apart for its use and for the use of its officers, jurors and witnesses, and, therefore, misbehaviour in such places is misconduct in the presence of the Court. Sir William MacMahon, M. R. in *Trench v. Trench* (1) observed that as a tribunal administering laws, without authority to protect its proceedings from outrage or disturbance presents to the mind the idea of an institution which must be impotent, dependent and frequently useless, the court will exercise its jurisdiction for outrages committed or insults offered in the face of the Court; he then added that the same jurisdiction will be extended to all the departments and offices of the Court, a proposition which results directly from the cases mentioned: *King v. Carroll* (2); *Roach v. Hall* (3); *Anon* (4); *Ex Burrows* (5); *Ex Jones* (6). The same principle was recognised in the decisions in *Re Johnson* (7); *Ex Wilton* (8); *Kirby v. Webb* (9); *Charlton's Case* (10). A similar doctrine has been adopted and repeatedly applied in cases of high authority in the Courts of the United States: *Fisher v. Mac Daniel* (11); *U. S. v. Carter* (12); *U. S. v. Emerson* (13); *State v. Woodfin* (14). No useful purpose would be served by a minute comparison of the facts of the different cases; what we are concerned with is the ascertainment of the general principle, and that principle is accurately formulated in the language used by Harlan, J. in delivering the unanimous opinion of the Supreme Court in *Ex Parte Savin* (15), "the Court, at least when in Session, is

(1) (1824) 1 Hogan 138

(2) (1744) 1 Wilson 75.

(3) (1742) 2 Atk. 469; 2 Dick 794.

(4) (1795) 2 Ves. 520.

(5) (1803) 8 Ves. 535.

(6) (1806) 13 Ves. 237.

(7) (1887) 20 Q. B. D. 68.

(8) (1842) 1 Dowling N. S. 805.

(9) (1887) 3 T. L. R. 763.

(10) (1837) 2 My & Cr. 316.

(11) (1901) 9 Wyo. 457; 87 Am. St. Rep. 971.

(12) (1829) 3 Cranch C. C. 423; 25 Fed. Cas. 313.

(13) (1831) 4 Cranch C. C. 188; 25 Fed. Cas. 1012.

(14) (1844) 5 Ired (N. C.) 199; 42 Am. Dec. 161.

(15) (1884) 131 U. S. 267.

present in every part of the place set apart for its own use and for the use of its officers, jurors and witnesses; and misbehaviour anywhere in such place is misbehaviour in the presence of the Court." In the case before us, there is no room for doubt that the practitioner misbehaved in the presence of the Court within the meaning of this rule; in fact, the abusive language used by him was heard by the presiding Judge himself, who was holding his Court in the room adjoining the office where the incident took place. In these circumstances, it is incontrovertible that this Court may take disciplinary action against the Mukhtear. No doubt, the power of suspension or removal is distinct from the power to punish for contempt [*Ex Parte Robinson* (1)], but a contempt may be of such a character as to warrant the exercise of the disciplinary powers of the Court. At the same time, we must not overlook that, as pointed out by Bowen L.J. in *Helmore v. Smith* (2), when the Court takes notice of a misconduct which consists in the obstruction of or an interference with one of its officers, the object of the discipline enforced is not so much to vindicate the dignity of the Court or the person of the officer, as to prevent undue interference with the administration of justice. From this point of view, the present case is not of much gravity; there was obviously no intentional disrespect towards the Court, the Mukhtear was rather moved by a sudden impulse. In view of these extenuating circumstances, and also of his long standing and position in the profession, we are of opinion that it will be sufficient to warn him as a mark of our disapproval of his conduct. We direct accordingly that he be warned.

D. K. R.

Mukhtear Warned.

(1) (1873) 19 Wallace:505

(2) (1886) 35 Ch.:D. 449 (455).

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PRIVY COUNCIL.

PRESENT :—*Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.*

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MAHOMED ISMAIL ARIFF AND OTHERS

v.

HAJEE AHMED MOOLA DAWOOD AND OTHERS.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

February, 23, 24,
28 & 29.
March, 1 &
May, 15.

Mahomedan law—Private and public trusts—Power of the civil Court over them—Juma Musjid—Management, scheme of—Appointment of trustees—Code of Civil Procedure (Act XIV of 1882), section 539—Power of the Court thereunder—Matters to be considered in framing a scheme of management thereunder.

The Mussulman law like the English law draws a wide distinction between public and private trusts. Generally speaking, in a case of a *wakf* or trust created for specific individuals or a determinate body of individuals, the Kazi, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public or charitable trusts, of which a public mosque is a common and well-known example, the Kazi's discretion is very wide. He may not depart from the intention of the founder or from any rule fixed by him as to objects of the benefaction; but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution.

In giving effect to the provisions of section 539 of the Code of Civil Procedure, 1882, and in appointing new trustees and settling a scheme thereunder the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on prior to suit, in conjunction with other existing conditions that may have grown up since its foundation. The Court has also the power of giving any directions and laying down any rules which might facilitate the work of management, and if necessary, the appointment of trustees in the future.

In this suit which was brought for the appointment of trustees and the settlement of a scheme of management in respect of the Sunni Juma Musjid at Rangoon, their Lordships remitted the suit to the Court of first instance with the declaration and directions that all other conditions being equal the Randheria section of the worshippers were preferably entitled to manage and act as trustees; that in order to avoid the mischief arising from the fact of leaving the power of appointing or electing trustees in the hands of an indeterminate

and necessarily fluctuating body of worshippers like a *punchayet* or *jamaet*, the appointment of future trustees should be entrusted to a committee of the worshipper, the composition of which committee should be in the discretion of the Court, with due regard to local needs and conditions, subject to the provision that, so long as circumstances did not vary, a majority of such committee should be Randherias; and that in settling the scheme the Court should lay down rules for the guidance of the committee in the discharge of any supervisitorial functions that might appear necessary to confide to them, and for filling up vacancies on their body subject to its control.

Ibrahim Esmael v. Abdool Carrim Peermamode (1) distinguished.

Two consolidated appeals from two decrees of the Chief Court of Lower Burma in its Civil Appellate jurisdiction (Sir Charles E. Fox, C. J., and Hartnell, J.), both dated the 29th May 1912, reversing a decree of the Chief Court of Lower Burma in its original Civil jurisdiction (Robinson, J.) dated the 25th April, 1910.

The facts of the case are stated in their Lordships' judgment.

Sir Robert Finlay, K. C., Arthur Page, and Abdul Majid, for the Appellants: Under the two deeds of 1871 an absolute title to the lands thereby sold was granted to the purchasers free from any trust and condition, and any trust of the lands granted by the deeds of 1862 which might previously have existed came to an end when the said deeds were cancelled and the lands resumed by the Government. The indenture of March 16, 1872, constituted a *wakf* for religious and charitable purposes and the provisions thereof vesting the management and control of the mosque and the lands in the Randher Sunni Jammanth Vora Punchayet are valid and operative under the Mahomedan law, and the Court must give effect to the terms of the indenture: *Shah Gulam Rahumtulla Sahib v. Mahommed Akbar Sahib* (2); *The Advocate General v. Futima Sultani Begam* (3); and Ameer Ali's Mahomedan Law, 4th edition pp. 452 and 461. Again, the mosque and the lands have always been managed and controlled by Randherias, and the Court in framing a scheme of management should follow the unbroken usage of 60 years, and give them the management and control of the mosque and the lands. In any case, the suit is for the settlement of a scheme and not for ascertaining what that scheme should be, and consequently any scheme which is settled for the management of the trust ought not to be inconsistent with the terms of the trust deed of 1872. As to the right of management

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(1) (1908) L. R. 35 I. A. 151. (2) (1875) 8 M. H. C. R. 63.

(3) (1872) 9 B. H. C. R. 19.

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reference was made to *Ibrahim Esmael v. Abdool Carrim Peermamode* (1). Reference was also made to Act XIV of 1882, section 539 and Act V of 1908, section 92.

Dunne and Coltman, for the Respondents: The case based on unbroken usage since 1862 is entirely a new case and was not raised in the Courts below. There the contention was that an entirely new secular title was created in 1872, but the Court of Appeal has rightly overruled that contention. The mosque and the lands formed a trust in which the whole Sunni community of Rangoon were interested, and the transactions of 1871 and 1872 in no way affected their rights or freed the properties from the pre-existing trusts. The control and management of the trust properties were vested in the said community and were not confined to the Randher Sunni Vora Punchayet. The fact that the Randherias always had the management does not necessarily show that it was the will of the original founder that they should always have the management: See *Ibrahim Esmael v. Abdool Carrim Peermamode* (1).

Arthur Page replied.

The judgment of their Lordships was delivered by

May, 15.

Mr. Ameer Ali.—The suit which gives rise to these consolidated appeals was brought in the Chief Court of Lower Burma in its original civil jurisdiction, under the provisions of section 539 of Act XIV of 1882, for the appointment of trustees and the settlement of a scheme of management in respect of a mosque, situated in the city of Rangoon. The plaintiffs in the action are five Mahomedan worshippers at the mosque, who trace their origin to a place called Randher, said to be a suburb or the city of Surat in the Bombay Presidency, and in the earlier stages of these proceedings they appear to have claimed it as a Randheria mosque. It is, however, conceded now that it is a public mosque dedicated to the performance of religious worship by all Sunni Mahomedans without restriction as to place of origin, and that it is commonly known as the Sunni Juma Musjid.

To explain the contest between the parties it is necessary to give a short summary of the circumstances that have led to this unfortunate litigation. Like many other places in Burma, Rangoon is inhabited by a large number of Mahomedan emigrants from various parts of India who have domiciled themselves in the country for purposes of trade, and are generally known by the names of the towns or villages whence they originally came. For example, the

plaintiffs, as already stated, derive their origin from Randher and, therefore, call themselves Randherias ; whilst the larger community of Suratis or Soortees come either from the city or district of Surat. It is necessary to bear this in mind, as the mosque in question is sometimes called the Surati mosque. The Randherias, though trying to differentiate themselves from the others, form in reality a section of the Surati community. They are mostly Voras, and they all profess the Sunni doctrines.

It appears that the site of the present mosque was formerly occupied by a bamboo structure built in 1854 by one Moolla Hashim, a native of Randher. It was dedicated to the same purpose, and bore the same name as the present masonry mosque. Divine worship was performed here by all Sunni Mahommedans until it was burnt down three years later, when Moolla Hashim replaced it with a building made of wooden planks. This continued to be the public place of worship until 1872, when the masonry mosque was erected.

The land on which the mosque was first built appears to have been afterwards added to by purchases made by Moolla Hashim or by his fellow townsmen, who made the same over to him as the custodian of the mosque. In 1862 one Moolla Ibrahim, a brother of Moolla Hashim, and two persons of the names of Golam Moideen Moollah and Cashim Azim, obtained from the Government a grant in respect of certain other plots on the express trust " to build and maintain thereon a mosque or place of worship for and to the use of all persons professing the Sunni sect of the Mahommedan religion."

These lands were also added or attached to the existing mosque, and shops were built there to yield an income for its maintenance.

In 1864, Moolla Hashim went on a pilgrimage to Mecca, leaving the management of the mosque in the hands of Moolla Ibrahim and the two persons already mentioned. He returned to Rangoon in 1866, but never resumed his management of the mosque. At this time the person in charge was one Mohammed Hashim Mehtar, who also is said to have been a native of Randher.

In 1870, the Government, finding that no mosque had been built on the lands granted in 1862, and that on the contrary shops had been erected thereon, issued a notice on the grantees to show cause why those lands should not be resumed. A meeting was thereupon held, apparently at the instance of the Randherias, of all the Sunni Mahommedans entitled to worship at the mosque, and it was decided to buy outright from the Government the land, and

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build on it a proper masonry structure suitable to the growing needs of the community. Although there is some dispute with regard to the contributions of the general body of Sunnis apart from the Randherias, it may be taken as fairly uncontroverted that the bulk of the fund was subscribed by the Randheria section of the worshippers. The conveyance was taken in the names of five persons, named respectively Dooplay, Ariff, Pattal, Mohammed Hashim and Ebrahim Ali Moolla, and these men in 1872, whilst the masonry mosque was in course of building, purported to create a new dedication.

The trust deed bears date the 16th March, 1872, and after reciting that it was made between the persons named above, of the one part, and one Mohammed Hashim, representing the general Sunni Mussulman community, of the other part, proceeds to declare that "the pieces or parcels of land upon a certain portion of which the Sunni Jamaet Musjid is erected or is in the course of being built, together with the godowns attached thereto, are solely dedicated for the purpose of divine worship." It then goes on to provide *inter alia* that its management shall remain exclusively in the hands of the Randheria Jamaet (people or assembly).

The five persons in whose names the conveyance stood and who had executed the trust deed appear to have carried on the management for several years; in course of time some dropped out and others came in as trustees. How these men were placed in charge of the management of the mosque is not clear, for apparently no meeting of the Randheria Punchayet was held until 1894, and none between 1894 and 1906, nor in fact had the Randherias any "organised association" with written rules for the purpose of giving effect to the wishes of their section of the community.

Matters remained in this condition until 1908, when disputes arose regarding the validity of the election of one Hashim Yacub Ally as a trustee in place of another Randheria, who had died the year before. It was in consequence of the quarrels among the Randherias themselves in connection with the election or appointment of this man, that the present suit was launched in the Chief Court of Lower Burmah. The original defendants to the action were four persons who were actually managing the mosque as trustees, but the validity of whose appointment as such was impugned by the plaintiffs. In addition three others were joined as defendants ostensibly to represent the Randheria section, but in reality, as the trustee defendants charge, to represent the plaintiffs' faction.

On the institution of the suit notices were issued by the Court under section 30 of the Civil Procedure Code to all persons entitled to worship at the mosque. Thereupon defendants 12 and 13, representing the general body of Sunni worshippers, and defendants 8 to 11 claiming to represent the Surati community, and 14 to 17 the other Randherias appeared and applied to be joined as parties. Each set of defendants has filed a separate defence. Although the trustee defendants deny the plaintiffs' allegation that the mosque in question is a Randheria mosque, and affirm the validity of their and Hashim Yacub Ally's appointment as trustees, they associate themselves with the plaintiffs and their Randheria co-defendants in claiming that the right of management of the mosque belongs exclusively to their party. And they ask that the scheme, if any is to be framed, should be framed on that basis.

The defendants 12 and 13, who represent the general body of worshippers, controvert in substance the right of the Randherias to a monopoly of the management as opposed to the whole nature of the trust; and they claim that as the mosque is dedicated to the performance of public worship by all Mahommedans of the Sunni persuasion, now that a scheme is proposed to be settled under the direction of the Court they should be allowed a voice in its administration.

The suit proceeded to trial before Mr. Justice Robinson, and the whole dispute centred round two points, viz :—

1. The effect of the trust deed of 1872, and
2. Whether the Randherias should or should not have the sole and exclusive charge and management of the mosque.

The Randherias rested their case on the trust deed of 1872; they contended that it created a new trust and that the founders, namely, the five persons in whose names the land had been purchased from the Government, were entitled to provide that the management should remain exclusively in the hands of their own section of the community. The learned trial Judge states their contentions in the following terms :—

"It is urged that the original mosque was created by a Randheria; that the original grant was revoked and the lands sold outright to Randherias, that they thus became the creators of the trust and were at liberty to make any lawful condition they pleased as to the management of the trust."

And his decision is expressed in these words :—

"The position in 1871, then, was that the five vendees became the absolute and untrammelled owners of these two plots and could

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do with them as they pleased.....They became the owners of the mosque, shops, and lands, and created a trust of them. It was undoubtedly open to them to manage the trust themselves or to lay down the manner in which it was to be managed, and this they did in Exhibit C."

He accordingly came to the conclusion that the Randheria party were exclusively entitled to the management of the mosque.

On appeal by the respondents in the first and second appeals respectively, the learned Judges of the Chief Court, differing from the Trial Judge, held in substance that the lands which were purchased by or in the names of the five persons in 1871 were acquired by them as trustees for the purposes of the existing mosque and subject to the trust therefor; and that nothing that took place in 1871 or 1872 had the effect of cancelling, or could in law cancel, the original trust; and that as the original trust was for the benefit of all persons "professing the Sunni sect of the Mahommedan religion," they thought that "all Sunni Mahommedans were entitled to a voice and control of the Juma Musjid, of Rangoon."

The plaintiffs and the trustee defendants have appealed to His Majesty in Council, and the same contention that was put forward in the Courts below, based on the document of 1872, has been urged on their behalf. It has further been contended that under the Mahommedan Law the Court has no discretion in the matter and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or *mutwallees*. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on a misconception. The Mussulman law like the English law draws a wide distinction between public and private trusts. Generally speaking, in case of a *wakf* or trust created for specific individuals or a determinate body of individuals, the Kazi, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Kazi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of

the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution.

Illustrations of this rule are to be found in almost every work on Mussulman law. And the authorities lay down that, "were the *wakif* (the founder) to make a condition that the King or Kazi should not interfere in the management of the *wakif*, still the Kazi will have his superintendence over it, for his supervision is above everything."

Their Lordships agree with the Chief Court that the transactions which took place in 1871 and 1872 in no way affected the existing trust, and that the trust deed of 1872 did not create a new dedication; the mosque remained as heretofore a public mosque, dedicated to the performance of worship by all Sunni Mahommedans as originally founded.

In their Lordships' opinion, the real point in issue in the case, owing probably to the nature of the pleadings, has to some extent been missed by the Courts in India. It has been treated as a question involving the determination of conflicting rights rather than a consideration of the best method for fully and effectively carrying out the purpose for which the trust was created. The suit is brought under section 539 of the Code, which vests a very wide discretion in the Court. It declares (omitting the parts not material to this case) that—"whenever the direction of the Court is deemed necessary for the administration of any express or constructive trust created for public, charitable, or religious purposes, the Advocate-General, acting *ex officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court, or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

(a.) Appointing new trustees under the trust;

(e.) Settling a scheme for its management;

or granting such further or other relief as the nature of the case may require."

In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown

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up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future.

In the present case, Moolla Hashim, although he was assisted by several of his compatriots in acquiring the land on which the bamboo mosque was built, was to all intents and purposes its original founder ; in 1857, when the bamboo structure was burned down, he replaced it with a plank building ; he and his Randheria fellow-townsmen held the *mutwalleeship* until 1871. Since that date also the management has been carried on by people belonging to Randher. In 1862, the lands were purchased with money supplied by them ; and in 1871 the bulk of the money appears to have come from the same source. It is not alleged that they have mismanaged the trust or committed any dereliction of duty, or tried to introduce innovations in the services, or otherwise interfered with the rights of the general body of worshippers. In these circumstances it seems to their Lordships, in the exercise of the discretion which the Mussulman law vests in the Kazi, that the Randheria section of the worshippers, all other conditions being equal, are preferably entitled to the *mutwalleeship* of the mosque. With regard to the case of *Ibrahim Esmael v. Abdool Carrim Peermamode* (1), which has been relied upon on behalf of the respondents, their Lordships deem it sufficient to say that the facts to which they have referred differentiate it widely from the present case.

The present case, however, in their Lordships' opinion, illustrates the mischief of leaving the power of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of people, whether they call themselves *Punchayet* or *Jamaet*. In order to avoid so far as possible a recurrence of the trouble that has brought about this long-drawn litigation, their Lordships think it desirable, in the interests of the institution which form the primary matter for consideration, that the appointment of future trustees should be entrusted to a committee of the worshippers the composition of which should be in the discretion of the Judge, with due regard to local conditions and needs, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias ; and that in settling the scheme the Judge should lay down rules for their guidance in the discharge of any supervisitorial functions that it may appear necessary to confide to them and for filling up vacancies on their body subject to his control.

Their Lordships are accordingly of opinion that the orders of the Courts of India should be discharged and that the case should be remitted with the following declaration and directions to the Chief Court of Lower Burma to deal finally with the matter: That all other conditions being equal, the Randheria section of the worshippers are preferably entitled to manage and act as trustees of the Sunni Juma Musjid, of Rangoon; that the appointment of future trustees should be entrusted to a committee of the worshippers, the composition of which committee should be in the discretion of the Court, with due regard to local needs and conditions, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the Court should lay down rules for the guidance of the committee in the discharge of any supervisitorial functions that it may appear necessary to confide to them, and for filling up vacancies on their body subject to its control.

As regards the costs in the Courts below, the trustee-defendants will have their costs out of the funds of the institution; the rest of the parties will bear their own costs.

The parties will bear their own costs of these appeals.

And their Lordships will humbly advise His Majesty accordingly.

Bramall and White :—Solicitors for the Appellants.

Arnould & Sons :—Solicitors for the Respondents.

J. M. P.

Appeals allowed and the case remitted.

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MUSAMMAT GIRJA BAI

v.

SADASHIV DHUNDIRAJ AND OTHERS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER,
CENTRAL PROVINCES, INDIA.]

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April, 6, & May, 19.

Hindu law—Mitakshara—Joint family estate—Partition—Intention by one member to separate—Suit for partition by a member—Widow's right to continue suit after plaintiff's death.

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Under the Mitakshara law a definite and unambiguous indication by one member of a joint undivided family of his intention to separate himself and to enjoy his share in severalty will amount to partition if the intention is unequivocal and clearly expressed ; and it must depend upon the facts of each case whether partition is effected thereby.

Suraj Narain v. Ikbal Narain (1) followed.

The intention to separate may be evinced either by explicit declaration or by conduct, and if it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit.

Appovier v. Rama Subha Aiyan (2) explained. *Joy Narain Giri v. Grish Chunder Mytee* (3) ; *Madho Pershad v. Mehrban Singh* (4) and *Deo Bunsee Koer v. Dwarkanath* (5) referred to.

Vato Koer v. Rowshun Singh (6) approved.

The appellant's husband served a registered notice on the manager of the Mitakshara joint family of which he was a member saying in explicit terms that his desire was to get partitioned his share and asking the manager to partition the joint estate without delay. A few days thereafter he instituted the suit for partition :

Held, that nothing could be more unequivocal or more clearly expressed than the conduct of the appellant's husband in indicating his intention to separate himself and enjoy his share in severalty by the said notice coupled with the suit ; that those acts amounted to a separation with all its legal consequences ; and that on the death of the appellant's husband during the pendency of the suit the appellant inherited his share and was entitled to continue the suit.

Appeal from two decrees (July 25, 1912) of the Court of the Judicial Commissioner, Central Provinces, reversing an order and a preliminary decree of the Court of the District Judge, Nagpur (January 23, 1911 and April 8, 1911 respectively).

On the 1st October 1908 the Appellant's husband Harihar sent a registered letter to Dhundiraj, the manager of the joint and undivided family of which he was a member requesting him to partition the joint estate. The family was governed by the Mitakshara law of the Benares school.

To that letter Dhundiraj's Vakil on his behalf sent a reply to the effect that the estate of the family had been joint for the last four generations, and no partition had taken place, till this day. It was therefore, desirable that as far as practicable, there should be no occasion for partition, and that no partition should be effected. If nevertheless a partition was to be made, it was better that he should himself make it, as he was the senior.

(1) (1912) L. R. 40 I. A. 40 ; 17 C. L. J. 288.

(2) (1866) 11 M. I. A. 75.

(3) (1878) L. R. 5 I. A. 228.

(4) (1890) L. R. 17 I. A. 194 ; I. L. R. 18 Calc. 157.

(5) (1868) 10 W. R. 273.

(6) (1867) 8 W. R. 82.

On the 21st October 1908 Harihar brought the suit giving rise to this appeal against Dhundiraj and other members of the joint family for a decree for partition and possession of his one-third share in the joint family properties. While the suit was pending Harihar died on the 17th June 1909, and his widow the Appellant applied for substitution of her name as plaintiff in place of that of her deceased husband. This application was opposed by the defendants on the ground that the deceased at the time of his death was joint with them and consequently the suit abated on his death. The District Judge found on the facts, which are fully set out in their Lordships' judgment, that Harihar had declared his intention to separate from the family and given effect to that intention by serving the registered notice of the 1st October 1908 demanding partition and after rejecting the defendant's proposal for a private settlement by filing the suit. He was of opinion that these facts together with the defendant's admission of Harihar's right to one-third share of the joint family property and the proceedings in the suit prior to his death brought the case within the principles laid down in *Appovier v. Ram Subha Aiyar* (1). He therefore held that Harihar at the time of his death "must be considered as being separated in estate," and his widow the Appellant was "therefore entitled to inherit his share" and continue the action.

The suit then proceeded and a preliminary decree for partition was given to the appellant.

The defendants appealed to the Court of the Judicial Commissioner against the order for substitution as well as against the preliminary decree. Both these appeals were allowed and the suit dismissed. The Judicial Commissioner held that no member of a joint and undivided family can separate himself from the joint family without an agreement between all the members thereof or an order, decree or declaration by the Court, and in the absence of such an agreement or order, decree or declaration Harihar must be held to have been joint at the time of his death, and that the suit therefore abated. The material part of their judgment was as follows :—

The question to be decided is purely one of Hindu Law, and we are of opinion that analogies drawn from the English law or any other system of jurisprudence can afford little assistance and may be misleading. We can start from the principle laid down in *Appovier v. Ram Subha Aiyar* (1), and repeatedly affirmed in subsequent cases by the Judicial Committee of the Privy Council, namely, that actual division by metes and bounds is not necessary to complete

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the dissolution of the joint tenancy of a Hindu family, because by an agreement between the co-parceners there may be an operative division of title which will convert the joint tenancy into a tenancy in common, without there being a corresponding division of the subject matter to which the title relates. Therefore, the question before us narrows itself down to this :—

In a Mitakshara family composed of co-parceners who are collaterals in relation to one another, is the mere communication of an intention to divide, made by one co-parcener to the other or others, sufficient to effect a severance of his interest in the joint estate, so as to make him, as it were, a tenant in common of a defined share which, upon his death, will devolve by inheritance as his severalty ?

We will now examine the material authorities cited before us, in order to see how far, if at all, they justify the affirmative answer which has been given to the above question by the lower Court, and which the Plaintiff-Respondent seeks to have repeated by this Court.

The only Sanskrit authorities which are said to deal expressly with the matter are the *Mayukha* and the *Saraswati Vilasa*, the relevant passages wherefrom, upon which reliance is placed for the Plaintiff-Respondent, have already been set out above. As regards the *Mayukha*, in the first place it is not a recognised authority in the school of law which governs this case. But, leaving that aside, the passage expressly refers to the case of a separation where no property is involved. In such a case separation is a matter of sentiment only, and a member who severs himself from his brethren does not invade or affect any legal right of his co-parceners. But where there is property, the severance of the interest of even a single member involves an alteration in the legal rights of his co-parceners, and, in particular, a dissolution of their birth-right in a portion of the joint property. It seems to be not only Hindu law, but equity and common sense, to hold that where a disposition of property jointly owned by two persons would, if made, affect the rights of them both, they should both have a voice in the matter and in the making of such a disposition. As remarked by Garth C. J. in *Radha Churn Dass v. Kripa Sindhu Dass* (1). "One can very well understand, that as regards separation, any member or members of a family, might separate from the rest at their option ; a mere declaration by one member that he was separate from the others would seem to be sufficient to effect the separation. But partition of the property is a different thing, because in order

(1) (1879) I. L. R. 5 Calc. 474 (476, 477).

to effect a just partition, it is necessary of course to ascertain the share to which each and every member of the family is entitled."

This passage has been clearly misunderstood by the learned counsel for the Plaintiff-Respondent, who has relied on it in support of his argument. It was also apparently misunderstood by Bhashyam Ayyangar J. in *Sudarsanam v. Narasimahulu* (1), and by DeGruyther, K. C. in *Maharaj Kedar Nath v. Thakur Ratan Singh* (2), where that learned counsel quoted it as an authority for the very proposition contended for on behalf of the Plaintiff in the present case. It seems clear from the passage itself that Garth C. J. used the word "separation" to denote something which was not a severance of joint interest in family property. We are not prepared to accept the inference drawn by the learned counsel for the Respondent before us that the *Mayukha* rule as to the requisites for a separation where there is no family property applies *a fortiori* to a severance of title to joint property.

As regards the passage from the *Saraswati Vilasa*, as already stated, it does not carry the case beyond the rule recognised in *Appovier's* case (3) and constantly reaffirmed since that decision was published.

It was said that the above Sanskrit commentaries expressly set forth what is implied in all the others. We have not been able to find in the text books anything more than this that partition is a consequence of intention and agreement. There is certainly no passage in the *Mitakshara* raising an implication that the wish of one co-parcener communicated to the other or others is of itself sufficient to dissolve the joint tenancy.

Turning now to the case law we think the most convenient way will be to examine first the relevant decisions of the supreme tribunal, and then those of the several High Courts.

In *Abraham v. Abraham* (4), the Judicial Committee were dealing with a family which, though purely Hindu in origin, had been for several generations converted to Christianity. Their Lordships laid down, more or less as an *obiter dictum*, that the *status* of a member of an undivided Hindu family was altered by his conversion to Christianity, since such conversion amounted, under Hindu law, to a severance of parcenership. This decision does not assist the Plaintiff in any way. By conversion to another religion the undivided Hindu becomes an outcaste. Under Hindu law that fact deprives him of his status in the joint family, and would also result

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(1) (1901) I. L. R. 25 Mad. 149 (156).

(2) (1910) 12 Bom. L. R. 656 (660).

(3) (1866) 11 M. I. A. 75.

(4) (1863) 9 M. I. A. 199.

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in forfeiture of his estate if the Statute law did not intervene. But Act XXI of 1850 interferes to prevent such forfeiture. The only way of giving effect to this Statute is by dividing off the share of the apostate from the joint estate which he is no longer qualified to hold in a state of jointness, and to treat it as his severalty. Such a partition is one made by statute, and not by virtue of any authority conferred on the severing parcener by Hindu law. It is a special case offering no analogy in support of the contention advanced in this case on behalf of the Plaintiff-Respondent.

The next case is *Appovier v. Rama Subha Aiyan* (1) as to which it is only necessary to say that it is the leading authority on the subject of partition of title unaccompanied by partition of the subject matter of such title. It was generally urged before us that it supports the case of the Plaintiff; but upon a careful perusal of the judgment of their Lordships, we are unable to find a single passage or phrase which is compatible with the view that a partition of title out of Court may be effected without an agreement among all the co-parceners.

In *Raja Suraneni Venkata Gopala v. Raja Suraneni Lakshma Venkama* (2) there was a formal agreement as in *Appovier's* case (1), and their Lordships again held that the agreement to divide dissolved the joint estate. They made no remark suggesting that if in place of the agreement between two brothers there had been only a demand, communicated by one to the other, the conclusion would have been the same.

Sri Gajapathi Radhika v. Sri Gajapathi Nilamani, (3) was another case of a formal agreement to divide between two joint Hindu brothers, and the rule in *Appovier's* case (1) was re-affirmed. Here again the case of the plaintiff finds no foothold.

In *Doorga Pershad v. Mt. Kundun Koowar* (4), the Judicial Committee laid down that inasmuch as there may be a division of a joint Hindu family and its property, which though not carried out by a partition by metes and bounds, would nevertheless alter the status of the family, the question in every particular case must be one of intention, i. e. (as stated in the judgment of their Lordships) "whether the intention of the parties to be inferred from the instruments which they have executed and the acts they have done, was to effect such a division." If anything, this is an authority against the Plaintiff, because it suggests that the intention of all the co-parceners,

(1) (1866) 11 M. I. A. 75.

(2) (1869) 13 M. I. A. 113.

(3) (1870) 13 M. I. A. 497.

(4) (1870) 21 W. R. 214.

expressed by agreement, is necessary to dissolve the joint estate. In any view the case affords no assistance to the Plaintiff.

Mahrajah Ram Kissen Singh v. Rajah Sheonund Singh (1), lays down that the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his allotted share in severalty severs the joint interest and extinguishes the rights springing from united family ownership. Here again we have the same foundation of a *family agreement* for the conclusion of the Court.

In *Pirithi Pal v. Jowahir Singh* (2), one of the ruling principles laid down was that a member of a joint Hindu family cannot sue for a share of the profits of a joint family estate because he has no definite share until partition. This suggests that the Plaintiff was not entitled to have his share treated as separate merely because he himself so treated it, and claimed profits in respect of it.

In *Madho Parshad v. Mehrban Singh* (3), the Judicial Committee said :—

“Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process..... Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient.”

In *Parbati v. Naunihal Singh* (4), which was again a case of mutual agreement among co-parceners, their Lordships of the Privy Council, reversing the judgment of the Court of the Judicial Commissioner of Oudh, insisted that the principle laid down in *Appovier's* case (5) should be followed.

In *Maharaj Kedar Nath v. Thakur Ratan Singh* (6), it was contended on behalf of the Appellants before the Judicial Committee that the mere fact of one co-parcener having filed a suit for partition amounted, in law, to a partition of title. Thereupon Mr. Ameer Ali, one of the presiding judges referred to *Debee Pershad v. Phool Koeree* (7), where it was held that a suit by one member of a Hindu family for a declaration of his right in the joint family property was not a sufficient indication on the part of the family of their intention

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(1) (1875) 23 W. R. 412.

(2) (1887) I. L. R. 14 Calc. 493.

(3) (1890) L. R. 17 I. A. 194 (196); I. L. R. 18 Calc. 157.

(4) (1909) I. L. R. 31 All. 412.

(5) (1866) 11 M. I. A. 75.

(6) (1910) 12 Bom. L. R. 656 (660).

(7) (1869) 12 W. R. 510.

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to separate. In the same case another member of the tribunal, Sir Arthur Wilson, asked, "Is there a case where one co-parcener declared that he was separate, and it was held that such a declaration constituted partition?" DeGruyther, K. C., cited *Radha Churn Dass v. Kripa Sindhu Das* (1), as an authority in support of that proposition; but, as already pointed out, the learned counsel clearly misunderstood the true significance of the word "separation" as used by Garth C. J. in that case.

We turn now to the decisions of some of the Indian High Courts.

The following cases were then referred to and discussed :

Bulakee Lal v. Must. Indurputtee Kowar (2); *Badamee Koer v. Wazid Singh* (3); *Raja Ram Tewary v. Luchmun Persad* (4); *Mussamut Vato Koer v. Rowshun Singh* (5); *Mussamut Deo Bunsee Koer v. Dwarkanath* (6); *Gopee Lall v. Mohunt Bhugwan Dass* (7); *Ram Dhyani v. Musst. Phoolbas* (8); *Must. Phoolbas Koer v. Lala Jagessur Sahey* (9); *Sadaburt v. Foolbash* (10); *Bhoobun Mohini v. Poorno Chunder* (11); *In re Phuljari Koer* (12); *Joy Narain v. Goluck Chunder* (13); *Raghubanund v. Sadhu Churn* (14); *Radha Churn v. Kripa Sindhu* (1); *Tej Pratap Singh v. Champu Kalee Koer* (15); *Jogendra Nath v. Baladee Dass* (16); *Satya Kumar v. Satya Kripal* (17); *Kandasami v. Dorai Ammal* (18); *Subbaraya v. Manik* (19); *Sudarsanam v. Narasim Hulu* (20); *Babaji Parashram v. Kashibai* (21); *Sakharam v. Hari Krishun* (22); *Ashabai v. Haji Tyeb* (23); *Bilase v. Dinanath* (24); *Jogul Kishore v. Shib Sahai* (25); *Diwaker v. Janardhan* (26); *Bina Pujari v. Biraj Mohun* (27); *Ramprosad v. Deokaran* (28); *Abdul Aziz v. Ajudhia* (29); *Mukund Ram v. Ramratan* (30);

(1) (1879) I. L. R. 5 Cal. 474 (476, 477).

(3) (1866) 5 W. R. 78.

(5) (1867) 8 W. R. 82.

(7) (1869) 12 W. R. 7.

(9) (1872) 18 W. R. 48.

(11) (1872) 17 W. R. 99.

(13) (1876) 25 W. R. 355.

(15) (1885) I. L. R. 12 Calc. 86.

(17) (1909) 10 C. L. J. 503.

(19) (1896) I. L. R. 19 Mad. 346.

(21) (1880) I. L. R. 4 Bom. 157.

(23) (1885) I. L. R. 9 Bom. 115.

(25) (1882) I. L. R. 5 All. 430.

(27) (1889) 3 C. P. L. R. 126.

(29) (1902) 15 C. P. L. R. 156.

(2) (1865) 3 W. R. 41.

(4) (1867) 8 W. R. 15.

(6) (1868) 10 W. R. 273.

(8) (1870) 14 W. R. 339.

(10) (1869) 12 W. R. 1 F. B.

(12) (1872) 8 B. L. R. 385.

(14) (1878) I. L. R. 4 Calc. 425.

(16) (1907) I. L. R. 35 Calc. 961.

(18) (1878) I. L. R. 2 Mad. 317.

(20) (1901) I. L. R. 25 Mad. 149.

(22) (1882) I. L. R. 6 Bom. 113.

(24) (1880) I. L. R. 3 All. 88.

(26) (1889) 3 C. P. L. R. 64.

(28) (1892) 6 C. P. L. R. 60.

(30) (1906) 2 Nag. L. R. 52.

Suraj v. Sheopershad (1); *Krishnasami v. Rajagopala* (2); *Gurlingapa v. Nandapa* (3); *Aiyyagari Venkataramayya v. Aiyyagari Ramayya* (4) and it was held :

Upon the best consideration that we have been able to give the matter we are of opinion that, except in the special case of a father severing from his sons, partition of property unaided by the Court, among the members of a joint Hindu family governed by the Mitakshara, can only be effected by an agreement among all the co-parceners concerned, whereby, at least, they declare their intention to separate. We hold that a declaration of such intention by any fraction of the co-parcenary body, or the mere demand by any member for partition of his share, does not of itself disrupt the family estate or destroy the right of survivorship.

For the above reasons this appeal, and First Appeal 16 of 1911, are allowed, and the decree and Order from which they are respectively made are set aside. We declare that on the death of Harihar the suit for partition instituted by him, out of which these appeals have arisen, abated, and that by operation of the Mitakshara law of survivorship, his undivided interest which he sought to have partitioned has lapsed to the Defendants.

The appellant thereupon appealed to His Majesty in Council.

Sir Robert Finlay, K.C., and *Dunne*, for the Appellant :

Both Courts have concurrently found that Harihar intimated to the respondents in clear and unequivocal terms his intention to convert his joint estate into an estate severalty, and such a declaration of intention amounts to separation : *Pandit Suraj Narain v. Pandit Ikbal Narain* (5), which was decided about six months after the judgment under appeal was delivered. This case covers the point in issue and it is not necessary to go through all the authorities referred to by the Court below.

De Gruyther, K.C., and *J. M. Parikh*, for the Respondents :

The notice of the 1st October 1908, does not amount to partition or separation, which operates from the date of a decree for partition or an agreement to partition. Until that time any single member of a joint family can ask for and demand partition, but such a demand does not amount to partition. Specific interest in severalty arises for the date of a decree or agreement.

[Sir John Edge : Do you question the decision in *Suraj Narain v. Ikbal Narain* (5) ?

The decision in that case is based on the facts of the case and

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| (1) (1880) I. L. R. 5 Calc. 148. | (2) (1893) I. L. R. 18 Mad. 73. |
| (3) (1896) I. L. R. 21 Bom. 797. | (4) (1902) I. L. R. 25 Mad. 690. |
| (5) (1912) L. R. 40 I. A. 40 ; 17 C. L. J. 288. | |

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not on the proposition of law there stated. It was not necessary for the decision in the case to state that proposition of law, which was not arrived at after a full discussion at the Bar of all the authorities on the point, which is now raised. But if their Lordships were of opinion that the proposition of law stated in that case was necessary for the decision there, we should be permitted to discuss the law applicable to the point fully. It is one of the most important questions which have recently come before the Board. There are numerous authorities against the law as stated in *Pandit Suraj Narain v. Pandit Ikbal Narain* (1).

[Lord Shaw said that the decision in *Suraj Narain v. Ikbal Narain* (1) was a very recent decision, which was binding, and that the point was not open to argument].

Reference was made to *Appovier v. Rama Subba Aiyar* (2), *Pirthipal Singh v. Thakur Jowahir Singh* (3); and Mayne's Hindu Law, 8th. ed., p. 339, para. 270.

Sir Robert Finlay, K.C., replied.

[Mr. Ameer Ali referred to *Madho Pershad v. Mehrban Singh* (4)].

The judgment of their Lordships was delivered by :

Mr. Ameer Ali—This appeal from two judgments and decrees of the Judicial Commissioner's Court in the Central Provinces of India arises out of a suit brought by one Harihar, since deceased, on the 21st October, 1908, in the Court of the District Judge of Nagpur. The object of the suit was to obtain a declaration of his right to a one-third share in certain movable and immovable properties, which till then had been held as appertaining to a joint undivided Hindu family, of which he had been a member, a decree for partition, and other ancillary reliefs.

Harihar died on the 17th June, 1909, during the pendency of his suit, and the question in the case is whether at the time of his death he was separated from the joint family. If he was, his share would be inherited by his widow Girja Bai, the appellant; if not, the defendants, respondents in this appeal, would take it by survivorship.

The facts of the case are simple, and may be stated briefly. Bapuji, the common ancestor, left several sons, among them Harihar, the plaintiff in this suit; two, Damoodur and Balaji, died many years ago without any issue. Atmaram, the eldest, who became the manager of the family on Bapuji's death, died in 1899, leaving Dhundiraj,

(1) (1912) L. R. 40 I. A. 40; 17 C. L. J. 288.

(2) (1866) 11 M. I. A. 75.

(3) (1886) L. R. 14 I. A. 37.

(4) (1890) L. R. 17 I. A. 194; I. L. R. 18 Calc. 157.

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the first defendant, the son of his brother Ram Chunder, whom he had taken in adoption. Dhundiraj became the manager after Atmaram's death, and acted as such when this suit was instituted. He has since died, and he is now represented by his son Sadashiv. Ram Chunder died in 1902, leaving Nilkantha, his son, and two grandsons, all of whom are defendants in this action. Jageswar, another brother, died in 1906 without leaving any male issue. Thus, on the 1st October, 1908, when he brought his suit, Harihar was entitled to a one-third share of the joint property. It is alleged in the plaint that after Atmaram's death "dissensions arose in the joint and undivided family," and in consequence thereof two shops were set up at Parseoni, their place of residence, one in the name of Harihar, the other in that of Dhundiraj, and separate *bahi-khattas* (account-books) were opened in their respective names. The plaintiff further alleged that for "these reasons" he did not wish to continue as a member of the joint family; that he had communicated his intention to the defendants; and had, on the 1st October, 1908, served a registered notice on the first defendant, "the manager of the joint family," and "as the defendants were collusively putting off partition and evading to give him his share he was obliged to bring this suit." The cause of action was stated to have arisen on the 1st October, 1908, when he demanded partition and his one-third share.

The defendants admitted the plaintiff's claim, and added that in answer to the registered notice, the first defendant had stated that he had no objection to a division of the estate which "should be made by private persons without going to Courts." They further urged that as they were willing to divide the estate, the suit was premature and that they should not be saddled with costs.

What took place before the District Judge subsequent to the appearance of the defendants and the filing of their written statement appears clearly from the judgment of the Judicial Commissioners under appeal. The learned Judges say :—

"The defendants entered appearance on the 15th February, 1909, and on the 9th March, 1909, it was admitted on their behalf that the plaintiff was entitled to have a decree for partition of a one-third share. As to the property to be divided, after some controversy the parties were in agreement except in respect of certain movables. The District Judge, being desirous of consulting the parties regarding the best mode of carrying out the partition, adjourned the case for their personal attendance to the 4th May, 1909. On that date the case was put off to the 10th May, 1909, at the instance of the

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defendants, who sought a compromise. Then there was a further adjournment to the 20th June, 1909, upon the ground that the illness of defendant Dhundiraj had prevented negotiations for a compromise."

On Harihar's death on the 17th June, 1909, his widow, Girja Bai, the present appellant, applied for substitution as the heir and legal representative of her deceased husband, and then the contest began. The defendants objected to her substitution, on the ground that at the time of his death Harihar was an undivided member of a Hindu joint family, and that on his decease his share passed to them by survivorship. On the 23rd January, 1911, the District Judge overruled their objections, and made the usual order for substitution in favour of the appellant. The case then proceeded to trial, and on the 8th April, 1911, a preliminary decree was made directing partition of the joint estate by commissioners appointed for the purpose.

The defendants appealed to the Judicial Commissioners' Court both from the order of the 23rd January, 1911, directing the substitution of Girja Bai's name in place of her deceased husband, and from the preliminary decree of the 8th April following. The Judicial Commissioners in an elaborate and learned judgment have upheld the defendants' contentions; in substance the conclusion at which they have arrived amounts to this: that no member of a joint undivided family under the law of the Mitakhshara can separate himself from the joint family, or sever the status so far as he himself is concerned, without the consent of the others, or without an effective decree of the Court.

The two following passages from the judgment of the Appellate Court will show that their Lordships apprehend correctly the decision of the learned Judicial Commissioners. In one place, dealing with Harihar's action, they say:—

"The defendants admitted what they could not deny, namely, that Harihar had a joint one-third share with themselves which he was entitled to have partitioned; but to confess the existence of a co-parcenary interest is not the same thing as even a passive consent to the severance of that interest; much less is it tantamount to an agreement to divide. The defendants never denied the title of Harihar, either before or after the suit, but they were all along averse to a partition, and, up to the day of his death, sought to compromise the suit by inducing him to abandon his desire to break up the joint estate. When he died the case stood adjourned in order that a compromise might be effected, and, in the circum-

stances, the only compromise (once the share of Harihar and the estate to be divided had been admitted), which defendants could have sought, was an abandonment of the partition. The pleadings merely indicate what had already taken place, namely, that Harihar had finally decided to sever his estate, and had demanded that this should be done."

And again :—

"It remains therefore to decide, whether, as claimed by the plaintiff, Harihar alone, despite the wishes of the other co-parceners, could, by setting up an intention to separate followed by a demand for partition, convert his joint share into a tenancy in common, so as to destroy the defendants' right of survivorship therein ; his title as co-parcener, and the extent of his share being admitted by the defendants. If this is the law, then the plaintiff must succeed. If, on the other hand, agreement between all the co-parceners in pursuance of an intention to divide was necessary to cause the severance of interest claimed by the plaintiff, then the appeals of the defendants now before us must prevail."

Their Lordships regret they cannot assent either to the inferences of law sought to be derived from the undisputed facts in the case, or to the principle on which the learned Judges purport to base their judgment.

Their Lordships think it necessary to refer again briefly to some of the circumstances with regard to which the Appellate Court appears to be under a misapprehension. As already stated, Atmaram, the eldest brother, who, on Bapuji's death, became manager, died in 1899. Disputes in the family, as Harihar alleged in his plaint, arose shortly after his death. On the 14th February, 1902, Harihar and Jageswar, who was alive at the time, wrote to Dhundiraj, who had become manager in his adoptive father's place, intimating their wish to separate themselves from the joint family, and asking him to have a division of the family property made by arbitrators. Matters seem to have remained in a quiescent stage for the next six years, although Harihar alleged that two shops and business accounts had been opened in his and the first defendant's separate names.

Jageswar died in 1906, and on the 1st October, 1908, Harihar sent to Dhundiraj the registered letter already referred to. In that letter he says in explicit terms that his desire is to get partitioned his one-third share, and asks Dhundiraj to take the matter in hand "soon after the receipt of the letter" and to make a division of the joint estate, and adds, "but do not delay partition." On the 19th

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October the defendant sends a reply through a pleader ; he first tries to persuade Harihar to abandon his intention of getting the joint estate divided, and then goes on to say : "If you, nevertheless, intend to have a partition made, it is better you should yourself make it, since you are senior." And the mode in which this should be done is suggested.

Harihar, evidently not satisfied with the delay that had taken place in the reply, brought his suit three days after the defendant's letter. Written statements were filed on the 15th February, 1909, and on the 9th March following the District Judge recorded the following additional statement, as he calls it, by the defendants' pleader : "The defendants do not deny the plaintiff's right to claim one-third share in the joint family, both movable and immovable. The plaintiff's suit is not premature, but he will not be entitled to his costs because we were ever willing to give him his share."

The District Judge's order made on that date is significant. After stating that neither the plaintiff's right to claim partition nor the extent of his share is denied, he says : "Under these circumstances, I think it necessary to have the parties before me in person, so that I may ascertain from them how the partition is to be effected."

It appears to be absolutely clear that on the 9th March, 1908, the parties were of one mind on the question of partition. The plaintiff demanded a division of the joint family property. The defendants had agreed, perhaps at first unwillingly, to the demand, which they could not resist. The only question that remained for the Court to determine was the best mode of effecting the division. Their Lordships are unable to see on that date any disagreement or averseness in fact to the plaintiff's demand on the part of the defendants. All his acts subsequent to the registered notice evince a fixed determination to sever himself from the joint family. With reference to these acts, the Judicial Commissioners say as follows :—

"Rao Bahadur Bapurao Dada, a well-known pleader of this Court, examined as the fourteenth witness for Harihar's widow, has proved that Harihar refused all proposals to continue in a state of jointness after he had sent the letter of 1st October, 1908 ; that he persisted in his demand for a share ; and that, his demand not being promptly complied with, he filed the present suit. He himself bought the stamp, and first asked Mr. Bapurao Dada, the family lawyer, to institute the litigation ; but finding him disinclined to do so, because he was engaged in mediating to bring about a compromise,

Harihar had the plaint presented by another legal adviser, leaving Mr. Bapurao Dada to appear for the defendants."

And they go on to say—

"Upon these facts we have no hesitation in coming to the conclusions :—

"1. That before filing the suit Harihar did in clear and unequivocal terms communicate to the defendants his earnest desire and his fixed intention to convert his estate from a joint estate into an estate in severalty."

The learned Judges, however, as already observed, held that this was not sufficient to constitute a severance of the joint status.

In the case of *Suraj Narain v. Ikbal Narain* (1), the rule of law applicable to cases of separation from the joint undivided family was laid down by their Lordships in the following terms :—

"What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family, and convert a joint tenancy into a tenancy in common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty, may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed."

It would probably be enough for the determination of this appeal to say that nothing could be more unequivocal or more clearly expressed than the conduct of Harihar in indicating his intention to separate himself and enjoy his share in severalty by the notice of the 1st October, 1908, coupled with this suit, and that these acts amounted to a separation with all its legal consequences.

But as the question of the effect on the joint status of such an intention has been raised in this case in a direct and concrete form, their Lordships think it fit to discuss the principle somewhat more fully than was necessary in *Suraj Narain v. Ikbal Narain* (1).

In the Hindu law, "partition" does not mean simply division of property into specific shares ; it covers, as pointed out by Lord Westbury in *Appovier's Case* (2), both "division of title and division of property." In the *Mitakshara*, Vijnaneswara defines the word *vibhaga* which is usually rendered into English by the word "partition," as the "adjustment of divers rights regarding the whole by distributing them in particular portions of the aggregate." Mitra Misra explains in the *Viromitrodaya* the meaning of this passage :

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he shows that the definition of Vijnaneswara does not mean exclusively the division of property into specific shares as alone giving right to property, but includes the ascertainment of the respective rights of the individuals, who claim the heritage jointly. He says (Sarkar's translation, chap. I, sec. 36): "For partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as a means of proprietary right. Indeed, what is effected by partition is only the adjustment of the proprietary right into specific shares." The *Viromitrodaya* is a commentary on the *Mitakshara*, the value and importance of which have been repeatedly recognised by the Board. So far as their Lordships are aware, nowhere in the *Mitakshara* is it stated that agreement between all the co-parceners is essential to the disruption of the joint status or that the severance of rights can only be brought about by the actual division and distribution of the property held jointly. If this were so and there were minors in a joint undivided family, partition would be impossible until they had all attained majority, a position which is expressly combated and negatived in the *Viromitrodaya* (chap. II, sec. xxiii). In fact later writers leave no room for doubt that "separation" which means the severance of the status of jointness is a matter of individual volition. For example, Nilkantha the author of the *Vyavahara Mayukha* (chap. IV, sec. iii, Mandlik's translation, p. 38), expressly lays down that "even when there is a total absence of common property a partition is effected by the mere declaration 'I am separate from thee,' for partition is a particular condition of the mind, and the declaration is indicative of the same." The *Sarasvati-Vilasa* gives expression to the same view. After quoting the definitions of various earlier writers, it says: "from this it is known that without any formality partition can be effected by mere intention;" (Setlur's translation of Hindu Law Books on Inheritance, p. 122). Their Lordships are aware that the *Vyavahara Mayukha* is not recognised as an authority in the Benares school; they refer, however, to the dictum of Nilkantha as showing the general conception of Hindoo legists on the subject of severance from jointness. But the following gloss in the *Viromitrodaya* appears to their Lordships conclusive on the rule of law under the *Mitakshara*: "Here again," it says, "partition at the desire of the sons," which expression includes grandsons and great-grandsons (see section 23A), "whether in the lifetime of the father or after his demise, may take place by the choice of a single co-parcener, since there is no distinction," (chap. II, sec. xxiii).

Their Lordships do not think it necessary to examine further the law as laid down in the texts. They propose to refer shortly to the cases which establish clearly that separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well-founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others.

In *Madho Pershad v. Mehrban Sing* (1), Lord Watson delivering the judgment of this Board, declared in explicit terms, the nature of the right possessed by individual members of a joint and undivided Hindu family: "Any one of several members of a joint family," he said, "is entitled to require partition of ancestral property, and his demand to that effect, if not complied with, can be enforced by legal process." Partition does not give him a title or create a title in him, it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers. Lord Watson makes this perfectly clear in the passage that follows:—

"So long as his interest is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes; but as soon as partition is made he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property."

In this connection their Lordships desire to refer to the language used by that distinguished Hindu Judge, Mr. Justice Dwarkanath Mitter, in *Deo Bunsee Koer v. Dwarkanath* (2), a *Mitakshara* case:—

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(2) (1868) 10 W. R. 273.

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"Now it is a settled doctrine of the Hindu law," said that learned Judge, "that every member of a joint undivided family has an indefeasible right to demand a partition of his own share. The other members of the family must submit to it whether they like it or not."

It appears to their Lordships that the Appellate Court has, in this case, confused the two considerations to which reference has been made above, viz., the severance of status which is a matter of individual volition, with the allotment of shares which may be effected by different methods: by private agreement, by arbitrators appointed by the parties, or, in the last resort, by the Court.

In *Appovier v. Rama Subba Aiyar* (1), this Board had to deal with an argument based on a similar notion that a deed of division between the members of an undivided family "which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, was ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds." Lord Westbury, delivering the judgment of the Board, pointed out that the argument advanced before their Lordships proceeded "upon error in confounding the division of title with the division of the subject to which the title is applied." Then, after stating "the true notion of an undivided family under Hindu law," he proceeds thus:

"But when the members of an undivided family agree among themselves with regard to particular property, that it shall henceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

And in another place, he adds, "it is necessary to bear in mind the twofold application of the word 'division.' There may be a division of right, and there may be a division of property."

Some of the Courts in India have supposed Lord Westbury's expressions to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view. The Board there was dealing with a case in which division of right had already taken place, as evidenced by the "deed of division." The right which each individual member had in this

joint property did not spring from the deed or the agreement of the parties to which it gave expression ; the agreement only recognised existing rights in each individual member which he was entitled to assert at any time he liked.

The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit. In *Joy Narain Giri v. Grish Chunder Mytee* (1) their Lordships regarded the conduct of one of the two co-sharers who constituted the joint family "when he left the joint residence and withdrew himself from commensality as indicating a fixed determination henceforward to live separately from his cousin," and treated "the fact of his borrowing money for his maintenance, as well as making a will, as indicating, at all events, that he himself considered that a separation had taken place." The conclusion was based on the inference of intention derivable from the acts and declarations of the member who it was alleged had separated himself, and not from the conduct or attitude of any other party.

As early as 1867, shortly after the judgment of the Judicial Committee in *Appovier's* case, (2) Mr. Justice Kemp, one of the most eminent Judges of the Calcutta High Court, sitting with Mr. Justice Glover, in *Mussamat Vato Koer v. Rowshun Singh* (3) a case governed by the law of the *Mitakshara*, expressed himself thus on this question of separation :—

"Taking then the admitted facts of the case before us, we find that Sohun did publicly and unequivocally by petition presented in Court declare his intention to become from that date divided in estate. Such an intention amounts to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds. The acts and declarations of Sohun Singh, showing an unmistakable intention to hold and enjoy his own estate separately, and to renounce all rights upon the shares of his co-parceners, constitute, in our judgment, a complete severance or partition."

With that view of the law their Lordships entirely concur.

In the present case, Harihar, the husband of the appellant, unequivocally and unmistakably manifested his intention to separate himself from the defendants, and to hold, possess, and enjoy his unquestioned interest separately from them. In their Lordships' judgment, this was sufficient, under the Hindu Law, to constitute a separation and to divide him in estate from his co-parceners.

(1) (1878) L. R. 5 I. A. 228.

(2) (1866) 11 M. I. A. 75.

(3) (1867) 8 W. R. 82.

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Their Lordships are accordingly of opinion that the decrees of the Judicial Commissioners should be reversed, and those of the District Judge should be restored.

The respondents must pay the costs of this appeal and of the appeals in the Judicial Commissioner's Court. And their Lordships will humbly advise His Majesty accordingly.

E. Dalgado :—Solicitor for the Appellant.

Downer and Johnson :—Solicitors for the Respondents.

J. M. P.

Appeal allowed.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.

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BEATRICE ALICE DE STE CROIX,

v.

PHILLIP DE STE CROIX*

Guardianship—Father's right, if can be taken away—Divorce suit—Appeal by wife—Adultery admitted—Costs of appeal.

The Court though not precluded from making an order giving the divorced wife access to the children, is most reluctant to make such an order and never places the indulgence of the parents above the welfare of the children.

As a wife should not be precluded by want of means from establishing her case, either as a petitioner or respondent, the husband should make a deposit or give security for the estimated costs that might be incurred by her. But if she, being herself found guilty, actively brings the matter before the appellate Court, her husband cannot be called upon, as a matter of right, to provide for her costs. The Court may, in its discretion, make an order in favour of the wife.

Application by the Appellant.

Suit for dissolution of marriage instituted by the husband on the ground of wife's adultery. The wife did not deny the charge of adultery, but pleaded condonation, connivance and collusion. These pleas were not established in the primary court. Decree *nisi* was made, and the custody of the children of the marriage was given to

* Application in the matter of an appeal in suit No. 21 of 1915, decided by Mr. Justice Greaves on the 11th April 1916.

the husband, and costs of the suit and trial were ordered to be paid by the husband. The wife preferred an appeal. Subsequently an application was made by her to the appellate Court applying first of all that her husband should be restrained from sending the children of the marriage out of the jurisdiction of the Court and that the husband should make provision for the costs of her appeal.

Mr. Austoom for the Petitioner (wife).

Mr. Pearson for the Opposite Party (husband).

At the close of the arguments the Court delivered judgments upon the question of right of access of the petitioner to her daughters and intimated that judgment would be reserved upon the question of the liability of the husband to provide for the costs of the appeal by the wife.

The following judgments were delivered :

Sanderson, C. J—This is an application by Beatrice Alice De Ste Croix asking that this Court should make an order that the children of the marriage between herself and her husband should remain within the jurisdiction of this Court until her appeal is disposed of. It is a matter of painful nature, as so many applications in Divorce cases are, and this case is peculiarly painful, because it is that of a woman who had been married for a number of years and who has been a mother for a considerable time and who is struggling for the right of her continued access to her two daughters.

The principle upon which an application such as this ought to be considered was laid down in the case, *Symington v. Symington* (1) which was cited to us, the passage to which I desire to refer being at p. 420 :—"It should be the duty of the Court to look to the interest of the children and carefully to weigh the comparative advantages and disadvantages of giving the custody of all or any of them to the one parent or to the other. I am at a loss to conceive how any general rule upon such a subject can be laid down."

Now, in this case the facts are that the applicant was the respondent to a petition for divorce. During the course of the hearing, she through her learned Counsel stated that she was not in a position to deny the fact that adultery had been committed by her. But she set up other defences to the effect that her husband had condoned to the adultery she had committed, and that he had also condoned the adultery. A decree *nisi* was made by the learned Judge who heard the case having decided against the defences set up by the respondent. The daughters in question are respectively twenty and ten years old, and the elder daughter will be twenty-one this year in

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July : and, it is in evidence before us that she is engaged to be married and she is herself desirous of going to England and intends returning to India by December of this year. The husband has sworn an affidavit in which he said that even if this unfortunate matter had not occurred and if he and his wife had been still living together as man and wife, he would have thought it right to send home his other daughter who, as I have said was ten years old, in order that she might be put to school. What he proposes to do is to send the daughters to Jersey where he has property and where he has some sisters and that the younger girl should be put to a school which is called Jersey Ladies' School.

Now, under those circumstances, can this Court possibly say that the course which the husband proposes to take is an unreasonable one. Speaking for myself, I do not think it is. I think, it is often to the advantage of an English girl, ten years old, that she should leave this country, at all events for sometime for the sake of health and perhaps also for the sake of education : and, one must remember that the person who proposes so to deal with these girls is the father who has certain well known rights and duties which were referred to in the case which I have already mentioned, as follows : "The father's right to the guardianship of his child is high and sacred. Our Law holds it in much reverence and it should not be taken from him without gross misconduct on his own part and danger of injury to the health and morals of the children." Now, in this case, having regard to the finding of the learned Judge, there is nothing to be said against the morals or the conduct of the father : nor is there anything in the course which he proposes to take which is calculated to injure the morals or the health of the children. In my opinion, it would be wrong for us to interfere with the discretion which the law vests in the father who is the proper and legitimate guardian of the children under the circumstances of this case. Therefore, in my opinion, that part of the application must be refused.

With regard to the other part, as to the costs, we think this is a matter of considerable general importance, and therefore we think it right to take time to consider our judgment.

Woodroffe, J.—I agree.

Mookerjee, J.—I agree.

On the 8th May, the case was set down for further judgment upon the question of the liability of the husband to furnish the costs of appeal to the wife.

The judgments of the Court were as follows :

Sanderson, C. J.—In this case the husband brought a suit for divorce, and the learned Judge granted him a decree *nisi*, on the ground of the respondent's adultery : subsequently an application was made by her to this Court applying first of all that her husband should be restrained from sending the children of the marriage out of the jurisdiction of this Court. That matter was disposed of on the hearing of the application. It was further prayed that the petitioner in the Divorce suit should be ordered to make provision for the costs of her appeal to this Court, and we reserved our judgment upon that point.

The principle upon which the husband has been directed to make provision for his wife's costs in these cases has been laid down in *Robertson v. Robertson* (1), and the passage to which I wish to refer is at page 122. I am now reading from the judgment of Sir George Jessel where he says, "Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that, that rule is founded on the old English law, which gave the whole personal property of the wife to the husband, and gave him also the income of her real estate ; so that in the absence of a settlement (which, as we all know, is a comparatively modern introduction) she was absolutely penniless, and, therefore, the Ecclesiastical Court not only provided for the costs of her defence, but also gave her alimony *pendente lite* so as to provide for her maintenance." There is another passage at page 123, where the learned Master of the Rolls says, "I have given what I believe to be the true view of the origin of the liability of the husband ; but I am not oblivious to the nobler view, if I may so express it, held in the House of Lords, that no gentleman, indeed, no man of right feeling would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery. Really, if there had not been, as I do believe there is, the common and pecuniary reason for fixing the husband with the costs, I think that, that reason ought to be sufficient to all right-minded men." That principle was endorsed by Lord Justice Brett and also by Lord Justice Cotton at pages 124 and 125. In a subsequent case *Otway v. Otway* (2), there is a passage which is material at page 155, and it is to be noticed that this is a judgment of Lord Justice Cotton who was a party to the decision in *Robertson v. Robertson* (1). He says, "Then as regards the appeal

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(1) (1881) 6 P. D. 119 (122).

(2) (1888) 13 P. D. 141 (155).

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I doubted very much whether we ought to allow any costs of the wife on the appeal, we having decided against her on the ground that she had already been found guilty of adultery before any of the proceedings in the appeal were taken. But I think the case we have been referred to of *Holt v. Holt* (1) settles that question. If, after, she had been found guilty of adultery she had herself actively brought the matter before this Court, then I should have thought no provision ought to be made for her costs ; but here she was only defending herself against a proceeding taken by the husband, and that being so, I think that, following what is laid down in *Holt v. Holt* (1), it was reasonable for her to instruct a Solicitor and Counsel to appear. Therefore although her adultery prevented her from pledging the credit of her husband, and prevented her getting any alimony or allowance from the husband, yet, in my opinion, it does not prevent her from requiring her husband to provide for the costs reasonably incurred in bringing her case against his appeal before the Court. Therefore, I think we ought to allow her her costs of this appeal, as well as the costs of the proceedings in the Divorce Court." There is one other passage which I think is material to notice, and it is as follows, "There is one point I said I should mention, namely, with reference to the recent legislation as to the position of married women. If this marriage had been after the Act of 1882, we should have had to consider how far that old rule would apply where a woman was put, after that Act, in the position of a *femme sole*, retaining all her property, and being in a position to sue and be sued." That observation would of course affect the principle which was referred to by Sir George Jessel in *Robertson v. Robertson* (2), but it would not affect the second principle to which he refers at page 123 where he says, "but I am not oblivious to the nobler view.....held in the House of Lords, that no gentleman, indeed, no man of right feeling would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery."

Now, there are two passages in Halsbury's Laws of England 16th Volume, to which I think right to refer, because each of them deals with the question of practice. At page 561 and in clause 1139 there is this to be found : If a woman obtains a decree, and her husband appeals, she is entitled to defend herself, and he must provide her costs of the appeal. The fact that she has committed adultery does not necessarily affect the matter ; but if she, being herself found guilty, actively brings the matter before the Court, he

(1) (1858) 28 L. J. P. & M. 12.

(2) (1881) 6 P. D. 119 (122).

need not make such provision." Then after that, is cited *Otway v. Otway* (1). But there is a note to be found on the top of the notes at page 562 in which reference is made to an unreported case, *Campbell v. Campbell* 'in which the House of Lords ordered the sum of £ 150 to be paid to the wife to enable her to carry on the appeal;' and it is also noted that 'a similar result happened in the case of *Yelverton v. Longworth or Yelverton* (1864), not reported.' It is not quite clear whether in either case the wife was the appellant, but as I read the words it looks to me as if she was the appellant—we have not had the opportunity of getting further information as to the record in either of the cases, and, therefore, I am entirely depending on the notes.

The other passage is at page 604 (that is article 1235), and it is this, "where the wife, having obtained an order in the Court below, is the respondent to an appeal, the practice is to allow her costs of the appeal even if it is successful, and the husband may be ordered to pay into Court or give security for her costs of the appeal, the hearing being stayed until he does so; but this practice has no application where the wife is the appellant."

As far as I know those are the only authorities or references to which our attention was drawn during the argument of this case. In my judgment we ought not to make an order that the husband, should make provision for the costs of the wife's appeal in this case, having regard to the facts which are set out in the petition of the lady, in the various affidavits which are now before the Court. I need not refer to these facts in detail, but it is sufficient to mention that during the course of the case it was stated by the lady's learned Counsel in effect that she was not in a position to deny the adultery. Her case was based upon an allegation that her husband's conduct conduced to the adultery and that he in fact condoned it. This case has been held to be unfounded by the learned Judge. As I have said before, I do not wish to enter into the details which are set out in the affidavits; but, in my opinion, the facts are not such as to justify us in making an order that the petitioner in the Divorce suit should make provision for his wife's costs of the appeal. I wish to make it clear that I do not decide that this Court has no jurisdiction to make an order on the application of the wife who is an appellant to this Court: On the contrary I think this Court has jurisdiction to make such an order in a proper case if the Court thinks right so to do upon the facts of the case, even where

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the wife has had an order *nisi* made against her in the first Court, and where she herself is the appellant. I desire to confine my decision in this case simply and solely to the facts of this case, and to say that in this case the wife is not entitled to the order for which she asks.

Woodroffe J.—The petitioner prays that the respondent may be ordered to pay to the applicant's solicitor such sum as may be fixed by the Registrar towards the costs of her appeal. The husband filed a suit for divorce alleging adultery; and the usual provision was made for the wife's cost. Though adultery was originally denied it was and has been before us admitted and a decree was made for the dissolution. The petitioner wishes to appeal on the grounds of condonation, inducement to adultery and collusion which have disentitled plaintiff to the relief notwithstanding the adultery found. On the statement of facts made to us at the hearing there does not appear to be any substance in any of these grounds. It is unnecessary to decide the question of our power to make the order asked for. It is sufficient to say that I do not think that this is a case in which we should make such an order. I would therefore refuse the application.

Mookerjee, J.—This is an application by a wife who has appealed against a decree *Nisi* made by Mr. Justice Greaves on the 11th April 1916 in a suit for dissolution of marriage instituted by her husband on the ground of her adultery. The petitioner did not deny the charge of adultery, but pleaded condonation, connivance, and collusion. These pleas were not established to the satisfaction of the trial Judge. The decree *Nisi* was consequently made, and the custody of the children of the marriage, two daughters, was given to the husband. By a consent order made *pendente lite*, the petitioner is entitled to be paid a sum of Rs. 340 monthly by her husband by way of alimony, and also a specified sum towards her costs of the proceeding; the decree further directs the husband to pay her costs of the suit and trial. In the present petition, she prays, *first*, that her husband may be ordered to keep the children within the jurisdiction of the Court until the disposal of her appeal with a view to enable her to have access to them and not to send them away to Jersey as he intends to do, and *secondly*, that her husband may be directed to pay to her Solicitors such sum as may be fixed by the Court for and towards the costs of her appeal.

The Court has already refused her first prayer on the ground that the paramount consideration in a matter of this description is the benefit of the children and that in the present case, it was not for

their welfare that they should continue to reside here longer : *Symington v. Symington* (1), *D'Alton v. D'Alton* (2), *Phillips v. Phillips* (3). In fact, the Court, though not precluded from making an order giving the divorced wife access to the children is most reluctant to make such an order and never places the indulgence of the parents above the welfare of the children : *Handley v. Handley* (4), *Kelly v. Kelly* (5).

The Court, however, took time to consider its decision upon the second prayer in the application. Reliance has been placed in support of that prayer on the principle that as a wife should not be precluded by want of means from establishing her case, either as a petitioner or respondent, the husband should make a deposit or give security for the estimated costs that might be incurred by her. One reason usually assigned for this rule is that the law assumes that on her marriage all the property of the woman presumably passes to her husband, so that, for her protection, it is necessary that not only should she not be made liable to pay costs but that she should litigate at the expense of her husband : *Wells v. Wells* (6), *Clarke v. Clarke* (7), *Miller v. Miller* (8), *Milne v. Milne* (9), *Robertson v. Robertson* (10), *Smith v. Smith* (11), *Otway v. Otway* (12), *Earnshaw v. Earnshaw* (13). A second reason was assigned by Pigot, J. in *Young v. Young* (14), "in as much as the wife, in discharge of her duties as mistress of the household, is wholly occupied, it is impossible for her to acquire any property, and that consideration might fairly be used to influence the Court in determining whether in cases such as these the wife might not be entitled to obtain the necessary costs from her husband, apart from any question of right to her property." A third reason sometimes assigned in justification of the rule is that as a wife can bind her husband for necessities, her costs, incurred in a litigation about her matrimonial status, may be considered a necessity : *Jones v. Jones* (15) ; *Brown v. Ackroyd* (16). Whatever reasons historical or equitable may be discoverable in support of the rule, it has been generally followed in a long line of cases in this country, though sometimes not without reluctance :

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(1) (1875) L. R. 2 Sc. & Div. 415.

(3) (1872) 41 L. J. Mat. 891.

(5) (1870) 5 B. L. R. 71.

(7) (1865) 4 Sw. & Tr. 111.

(9) (1871) L. R. 2 P. & D. 202.

(11) (1882) 7 P. D. 84.

(13) (1896) P. 160.

(15) (1892) L. R. 2 P. & D. 331

(2) (1878) 4 P. D. 91.

(4) (1891) P. 124.

(6) (1864) 3 Sw. & Tr. 542.

(8) (1869) L. R. 2 P. & D. 13.

(10) (1881) 6 P. D. 119.

(12) (1888) 13 P. D. 141.

(14) (1886) I. L. R. 23 Calc. 916.

(16) (1856) 5 E. & B. 819.

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Fowle v. Fowle (1), *Proby v. Proby* (2), *Georgucopulas v. Georgucopulas* (3), *Thomson v. Thomson* (4), *Boyle v. Boyle* (5), *Mayhew v. Mayhew* (6), *Payne v. Pirojshah* (7), *Natall v. Natall* (8).

It is plain, however, that the doctrine in question is an encroachment upon the ordinary rule that costs follow the event; and, speaking for myself, I am of opinion that every attempt to extend its operation should be cautiously scrutinised. In the case before us, the charge of adultery is not denied by the wife; but she seeks to test, by way of appeal the correctness of the decision of the trial Judge on the special grounds she assigned with a view to resist a decree for dissolution of marriage notwithstanding her misconduct. I can discover no reasonable ground on which her claim, to be financed by her husband in the prosecution of her appeal in such circumstances can be justified. I can very well understand that if a wife obtains a decree, and her husband appeals, she may be held entitled to defend herself and to require her husband to provide her costs of the appeal: *Holt v. Holt* (9); *Earnshaw v. Earnshaw* (10). The fact that she has committed adultery may not in those circumstances, necessarily affect the matter. But if she, being herself found guilty, actively brings the matter before the Court, I cannot see how her husband may be justly called upon by her, as a matter of right, to provide for her costs. The view I take is in accord with that adopted by Cotton, L. J. in *Otway v. Otway* (11): "if after she had been found guilty of adultery she had herself actively brought the matter before this Court, then I should have thought no provision ought to be made for her costs." See also *Earnshaw v. Earnshaw* (10). I am not unmindful that the House of Lords has sometimes made an order on the husband to pay a round sum to his wife to enable her to carry on her case before the House of Lords: *Robinson v. Robinson* (12), *Keates v. Keates* (13), *Campbell v. Campbell* (14); *Yelverton v. Yelverton* (15). These cases are mentioned in note (e) to Art. 1139 in Vol. XVI of the Laws of England edited by Lord Halsbury. The circumstances under which the orders were made are, however, not stated, nor are the reasons available. These cases consequently merely show that circumstances

(1) (1878) I. L. R. 4 Calc. 260.

(3) (1902) I. L. R. 29 Calc. 619.

(5) (1903) 7 C. W. N. 565.

(7) (1911) 13 Bom. L. R. 920.

(9) (1858) 28 L. J. P. & M. 12.

(11) (1888) 13 P. D. 141 (155).

(13) (1859) Unreported.

(2) (1879) I. L. R. 5 Calc. 357.

(4) (1887) I. L. R. 14 Calc. 580.

(6) (1894) I. L. R. 19 Bom. 293.

(8) (1885) I. L. R. 9 Mad. 12.

(10) (1896) P. 160.

(12) (1859) Unreported.

(14) Unreported.

(15) (1864) Unreported.

are conceivable, in which the Court may, in its discretion, make an order in favour of the wife ; but they do not lay down an inflexible rule, and I cannot treat them as authorities which oblige me to hold that the application of the present petitioner should be granted. In my opinion, her second prayer must, like the first be refused.

Messrs Mitter & Bural—Solicitors for the Petitioner (wife).

Messrs Orr Dignam & Co.—Solicitor for the Opposite Party (husband).

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Application rejected.

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CIVIL RULE.

Before Sir Lancelot Sanderson Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight Judge.

KALIPADA KARMAKAR AND OTHERS

v.

SHEKHAR BASINI DASIA AND ANOTHER. *

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May, 1

Review, application for—High Court judgment—Limitation—Indian Limitation Act, section 12—High Court Rules, Appellate Side, Chapter XI, rule 4—Appeal—Suit for rent—Bengal Tenancy Act (VIII of 1885) section 153 (b)—Question of conflicting title not decided by primary Court—Appeal if lies to the first appellate Court—First Appellate Court deciding question of conflicting title—Second appeal.

The provision of section 12 of the Indian Limitation Act is applicable not only to appeals but also to an application for a review of judgment. Although a copy of the decree is not necessary to be attached to an application for review, in computing the period of limitation the time requisite for obtaining the copy of the decree shall be excluded and the period of limitation will not commence to run until at all events the day when the decree was signed by the Judges.

Rule 4 of chapter XI of the High Court Rules was intended to apply to the case where the Deputy Registrar gives a certificate that all the proceedings were in order and not to cases where the certificate of the Deputy Registrar was to the effect that the proceedings were not in order.

* Civil Rule No. 227 of 1916 in Appeal from Appellate Decree No. 1706 of 1913 against an order passed by Holmwood and Mullick, JJ. dated 23rd November, 1915, against the decree of R. N. Dutta, Esq. District Judge of Khulna, dated the 5th April, 1913, reversing that of Babu Srish Chandra Banerjee, Munsiff of 1st Court at Satkhira, dated the 26th April, 1912.

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Kalipada

v.

Shekhar Basini.

No appeal lies from a judgment passed by a Judicial Officer specially empowered by the local Government to exercise final jurisdiction under section 153 Bengal Tenancy Act, when none of the special questions mentioned in the section and in controversy between the parties has been actually decided by him.

In a suit for rent valued at less than Rs. 50, the defendant pleaded that the plaintiff was his benamdar. The Munsiff, who was empowered to exercise final jurisdiction under section 153 Bengal Tenancy Act, dismissed the suit on the ground that the plaintiff failed to prove realization of rent from the defendant in previous years without determining the question of title. Against that decision an appeal was preferred to the District Judge and an application for revision was also made to him in the alternative. The District Judge held that the appeal was competent and decreed the suit on the merits :

Held, that although no appeal lay from the primary Court to the first appellate Court, a second appeal lay from the latter Court to the High Court.

Kalipada v. Shekhar Basini (1) overruled.

Bhagabati v. Nanda Kumar (2) and *Amritalal v. Ram Chandra* (3) explained.

Per Sanderson, C. J.—A second appeal lay to the High Court as a question of conflicting title within the meaning of section 153 Bengal Tenancy Act was decided by the District Judge.

Per Mookerjee, J.—A second appeal lay to the High Court in accordance with the principle that where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction.

Meenakshi Naidu v. Subramaniya Sastri (4) and *Ranjit Misser v. Ramudar Singh* (5) referred to.

As the appeal to the first appellate Court was incompetent, the High Court sent the case back to the District Judge to deal with the application under the proviso of section 153 Bengal Tenancy Act.

Application for Review by the Defendants Appellants.

The plaintiff, a lady, alleging that she purchased the land from the original proprietor, sued her father as a tenant for rent, the amount claimed being less than Rs. 50. The father, defendant, set up the title in himself and pleaded that he purchased the holding *benami* in the name of his daughter, the plaintiff. The Court of first instance declined to decide the question of conflicting title and dismissed the suit holding that the relationship of landlord and tenant did not exist. The plaintiff appealed to the District Judge and also made an application at the same time under the proviso to section 153 of the Bengal Tenancy Act. The District Judge

(1) (1915) 23 C. L. J. 235.

(2) (1908) 12 C. W. N. 835.

(3) (1901) I. L. R. 29 Calc. 60.

(4) (1887) L. R. 14 I. A. 160.

(5) (1912) 16 C. L. J. 77.

overruled the preliminary objection of the defendant that no appeal lay before him and upon a consideration of the merits of the case made a decree in favour of the plaintiff. The defendant appealed to the High Court.

The appeal was dismissed by Holmwood and Mullick JJ.:
[See *Kalipada v. Shekhar Basini* (1)]

The defendant then filed an application for Review on the 21st February, 1916. As Mr. Justice Mullick retired from this Court on the 29th of February, 1916 and Mr. Justice Holmwood went on furlough on the 10th of March the application was presented by way of motion before their Lordships the Chief Justice and Mr. Justice Mookerjee who issued the present Rule.

Babu Baranasibasi Mookerjee for the petitioner.

Babus Sarat Chandra Roy Chowdhury, Dharendra Krishna Ray and Sasadhur Roy (Jr.) for the Opposite Party.

On behalf of the Respondents several preliminary objections were taken which were overruled by the following judgments:

Sanderson, C. J.—The whole of this matter arises out of the fact that on the 21st of February 1916, when an application for a review of a certain judgment was made, the fee of Re. 1-2 annas was paid instead of a fee of Rs. 2-4 annas. The first point with reference to that, which was made by the learned vakil for the respondent, was that the article in the statute of Limitation says that the time is ninety days from the date of the decree which must be taken, by reason of another provision, to be the same date as the pronouncement of the judgment. That would be so but for the fact that section 12 of the Limitation Act provides that "in computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, and an application for a review of judgment" (as is the case here) the day in which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded. In my judgment, that is a specific direction which has reference not only to an appeal but to an application for a review of judgment and even though the rules do not prescribe that a copy of the decree should be attached to the application, there is this specific direction contained in the statute that the time requisite for obtaining a copy of the decree shall be excluded: and, inasmuch as the decree was not signed until the 6th of January 1916, in my opinion the period of limitation would not commence to run

(1) (1915) 23 C. L. J. 235.

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until at all events that day in January 1916. Consequently the payment which was made on the 8th of March 1916 of the additional fee of Re. 1-2 annas would be within time. Therefore, the first point which the learned vakil for the respondent takes fails.

The second point is that under Chapter XI, rule 4, of the High Court Rules, Appellate Side, the appellant, to whom was handed a certificate by the Deputy Registrar that his application was irregular, ought to have moved the High Court within seven days from the date upon which the Deputy Registrar handed him the certificate. The words of the rule are "Within seven days from the date of such certificate, the applicant, either in person or by a Vakil or Advocate, shall present the *application* by way of Motion in open Court to the Division Court of whose judgment a Review is sought." The learned vakil, when I asked him what was meant by the word *application*, agreed that that could only mean an application for review. I think that is the correct interpretation. It is clear to me that that Rule was intended to apply to the case where the Deputy Registrar gives a certificate that all the proceedings were in order, and not to cases where the certificate of the Deputy Registrar was to the effect that the proceedings were not in order. As was pointed out by Mr. Justice Mookerjee, if the appellant under those last mentioned circumstances came to the High Court on an application for review of judgment, he would at once be met with the answer that the High Court could not hear the application it not being in order having regard to the certificate of the Deputy Registrar. Therefore, in my opinion, that point is not a good one. It was next argued, the application should not be heard by this Court now, because the Chief Justice of this Court can only hear an application for review if it is impossible for the Court which passed the judgment to hear it, or at all events, if there is not one of the Judges who decided the appeal available for the purpose. It appears that the additional fee was not paid until the 8th of March of this year. Until then the Registrar was not in a position to certify that the proceedings were in order. Until that moment, no application could be made for review of judgment, and inasmuch as Mr. Justice Mullick retired from this Court on the 29th of February 1916, and Mr. Justice Holmwood went on furlough on the 10th of March, two days after this matter was put in order, there was no time to make the application to either of the Judges. I, therefore, think that the application may be made to this Court and for the reasons above mentioned it is not out of time.

Mookerjee, J.—I agree.

Their Lordships then heard the appeal on the merits.

Babu Baranasibasi Mookerjee for the Petitioners Appellants.

Babus Sarat Chandra Roy Chowdhury, Dharendra Krishna Ray,
and *Sasadhar Roy (Jr.)* for the Opposite Party Respondents.

The following judgments were delivered :

Sanderson, C. J.—In this case the facts are a little peculiar : The action was brought by the plaintiff against the first defendant who is her father, and the second defendant who is her husband, and the action was brought for arrears of rent. The plaintiff alleged that she had purchased the property from the superior landlord of the first defendant, her father, on the 1st of September, 1908, and she sued for four years' arrears of rent, two, before the purchase and two after the purchase.

The defence set up by the first defendant, the plaintiff's father was that the land had not been purchased by the plaintiff at all, but that he himself was the purchaser and that the purchase had been carried through in the name of his daughter, the plaintiff. When the case came before the Court of first instance this issue as to whether the plaintiff was the owner in her own right and in the interest which she claimed, or whether she was simply nominee of her father, was raised ; but the learned Munsiff did not deal with it : He expressly said that he did not deal with the question of title ; but he said that inasmuch as the plaintiff had not proved the receipt of any rent from the first defendant he was justified in giving judgment for the defendant against the plaintiff. Thereupon, the plaintiff appealed to the District Judge and besides appealing she made an application at the same time as the appeal under the proviso of section 153 of the Bengal Tenancy Act. On the hearing of the appeal, it was urged before the learned District Judge on behalf of the defendant that it was not competent for the plaintiff to appeal, because the case had been heard by the Munsiff in pursuance of section 153 clause (b), the Munsiff being a judicial officer especially empowered by the Local Government to exercise final jurisdiction under this section, and the amount claimed in the suit not exceeding fifty rupees. It was urged that those being the facts no appeal lay from the decision of the learned Munsiff. On the other hand, the plaintiff said that an appeal did lie, because she urged, the learned Munsiff had decided a question relating to the title to the land, and the learned District Judge came to the conclusion that the learned Munsiff had decided a question relating to the title to the land, and therefore he held that an appeal lay, and he heard the appeal and decided that the

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truth lay on the side of the plaintiff that she in fact was the purchaser of the superior landlord's interest in the land and her father was liable to pay the rent for which she was suing. The application for revision under the proviso of section 153 naturally was not pressed, because the plaintiff got all that she wanted, she having succeeded in the appeal, and that application was dismissed, each party paying his own costs. Then the defendant appealed to the High Court, and the High Court decided first that the learned District Judge was wrong in holding that there was an appeal from the learned Munsiff to himself, and inasmuch as there was no appeal from the Court of first instance to the learned District Judge there was no appeal from the learned District Judge to the High Court : and, on these grounds the two learned Judges of this Court dismissed the appeal. An application was made to those two learned Judges on behalf of the defendant to exercise their powers of revision under section 115 of the Civil Procedure Code, but they said that having regard to the nature of the case and the facts which the learned District Judge found, they did not intend, to exercise their power of revision under section 115.

Under those circumstances the defendant obtained a Rule from this Court for a review of the judgment of the two learned Judges of the High Court.

The first question we have to consider is whether the learned Judges were right in holding that inasmuch as there was no appeal from the learned Munsiff to the District Judge there was no appeal from the District Judge to the High Court.

I agree with the decision that there was in this case no appeal from the Court of first instance to the learned District Judge, because the section says that "an appeal shall not lie from any decree or order passed, whether in the first instance or on appeal, in any suit instituted by a landlord for the recovery of rent where—(b)"—I have already read clause (b) and I need not read it again—"unless in either case the decree or order has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto....." As I have already said, in my opinion, there was raised before the Court of first instance a question relating to title to land as between parties having conflicting claims thereto : but the Munsiff expressly refrained from deciding that question. Therefore that question did not come within the words of the section, viz, "where the decree or order decided a question relating to title to land as between parties having conflicting claims thereto."

Then comes the second branch of the question whether the learned Judges were right in holding that there was no appeal to this Court. In my judgment, with every respect to them, they were wrong. The judgment was based upon a decision, to which our attention was drawn this morning, in *Bhagabati Bewa v. Nanda Kumar Chuckerbntty* (1). In that case the head-note is to this effect : a suit by a co-sharer landlord for his share of the rent only, without making the other co-sharers parties is a suit instituted by a landlord for the recovery of rent within the meaning of section 153, Bengal Tenancy Act. Where the rent claimed in such a suit did not exceed Rs. 50 and it was tried and dismissed by a Munsiff who was specially empowered under clause (b) of section 153,—Held, that no appeal lay to the Subordinate Judge and hence no second appeal from his decision reversing that of the Munsiff” Now, at the first sight that would appear to be material to this case. But when we look at the facts of the case it is clear that neither the learned Munsiff nor the learned Judge of the first Appellate Court had decided a question of title to land : and, as in that case neither of the Courts had decided that point, it may have been right to have held, that “if no appeal lies from the Munsiff to the Subordinate Judge, no appeal lies from the Subordinate Judge to the High Court.” I express no opinion on that question, as it is not necessary for the purposes of this case to do so : for in the present case the learned District Judge had decided a question of title between the parties, and therefore, in my judgment the case clearly comes within section 153 which, I may repeat, says that an appeal shall not lie from any decree or order passed whether in the first instance or on appeal..... unless in either case the decree or order has decided a question relating to title to land..... In this case it seems to be obvious that on appeal there was a question of title decided by the learned District Judge. Therefore, the case comes within the express provision of that section, and an appeal did lie from the learned District Judge to this Court. Therefore, the position is this : It being decided that an appeal does lie from the District Judge to this Court, and it having been already decided that there was no appeal from the learned Munsiff to the learned District Judge, the consequence is that the decision of this Court must be set aside, and as a natural consequence, the decision of the learned District Judge must also be set aside.

I should be sorry if the matter had to rest there, because one cannot disregard the finding of the learned District Judge who has

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investigated the case and has come to the conclusion that the plaintiff is entitled to the relief which she sought in this case, and has found that the truth lay on her side and that she was the real purchaser of this property ; and, I am glad to find that it is open to us to direct further investigation of the matter. It is not disputed by the learned Vakil for the defendant that we have jurisdiction to send this case back to the District Judge for further inquiry to be made either by himself, or if he thinks right, by the learned Munsiff : and, we think that the proper course to adopt is that this matter should be sent back to the learned District Judge in order that he may investigate the application which was made under the proviso of section 153 for the revision of the judgment of the learned Munsiff. That proviso is to this effect : "the District Judge may call for the record of any case in which a judicial officer as aforesaid has passed a decree or order to which this section applies, if it appears that the judicial officer has exercised a jurisdiction not vested in him by law, *or has failed to exercise a jurisdiction so vested* or has acted in the exercise of his jurisdiction illegally or with material irregularity, and may pass such order as the District Judge thinks fit."

Therefore, this case will go back to the District Judge, and if he has sufficient material already before him, to enable him to deal with the application under the proviso of section 153, of course he will deal with it. But if he thinks that it will be necessary to refer the matter to the learned Munsiff for taking evidence as to the facts—which may be necessary for making the further enquiry—he will do so.

The result of my decision is that the judgment of the High Court and that of the District Judge must be set aside, and the defendant must have the costs of this Rule (hearing-fee two gold mohurs)—and also the costs of the appeal to the High Court as well as the costs of the appeal to the learned District Judge.

Mookerjee, J.—I agree that this application for review of judgment must be granted, as the proceedings throughout this litigation have been characterized by a succession of inexplicable errors.

The plaintiff instituted the suit to recover arrears of rent from her father. The amount claimed did not exceed Rs. 50 and the suit was tried by a judicial officer specially empowered by the Local Government to exercise final jurisdiction under section 153 of the Bengal Tenancy Act. The defendant pleaded that the plaintiff had no title to the rent claimed, inasmuch as the interest of the superior

landlord had been purchased, not by the plaintiff, but by himself. On this state of the pleadings, a question clearly arose 'relating to an interest in the land as between parties having conflicting claims thereto.' The trial Court, however, declined to investigate this point and dismissed the suit on the ground that as the plaintiff had failed to prove realization of rent from the defendant in previous years, she was not entitled to succeed in her present claim. The first question is, did an appeal lie against this decree. Now, in order to determine whether an appeal lies from a judgment passed by a judicial officer specially empowered by the Local Government to exercise final jurisdiction under section 153 of the Bengal Tenancy Act, the test to be applied is, not whether one of the special questions mentioned in the section has been in controversy between the parties, but whether the decree has actually decided such a question. In the case before us, the judgment of the trial Court makes it clear that the question of conflicting title was not decided. Consequently no appeal lay to the District Judge; yet an appeal, was preferred to him. A preliminary objection that the appeal was incompetent was erroneously overruled, the appeal was heard on the merits, the judgment of the trial Court was reversed and a decree was made in favour of the plaintiff on the ground that the interest of the superior landlord had been purchased by her and not by the defendant. A second appeal was then preferred to this Court and the decree of the District Judge was assailed on the ground that it had been made without jurisdiction. This was controverted by the respondent who argued that the appeal to the District Judge was competent. This contention was rightly overruled on the authority of the decision in *Shilabati v. Roderiques* (1). This Court, (Holmwood and Mullick JJ), however, did not give effect to the view that the appeal to the District Judge was incompetent, but proceeded to hold on the basis of the decision in *Bhagabati Bewa v. Nanda Kumar Chakrabarti* (2) that inasmuch as the decree of the District Judge had been passed without jurisdiction, the appeal to this Court was incompetent. The result was that the appeal to this Court was dismissed and the decree of the District Judge stood untouched. On the present application for review of judgment, we are invited to consider the correctness of this decision.

On behalf of the respondent, the view has been maintained, that if an appeal has been heard without jurisdiction, no appeal lies from the appellate decree which must be deemed a nullity; reliance has

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(1) (1908) I. L. R. 35 Calc. 547.

(2) (1908) 12 C. W. N. 835.

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been placed on the decision in *Bhagabati v. Nanda Kumar* (1) and the observations in *Amrita Lal Mukherji v. Ram Chandra Roy* (2). In my opinion, the proposition formulated by the respondent is unsound in principle and is opposed to the authorities. It is clear that the observations in *Bhagabati Beva v. Nanda Kumar Chakrabutty* (1), though expressed in general terms, must be limited by the facts of the case then before the Court. The facts were such as made an appeal from the decision of the trial Court to the Subordinate Judge incompetent, and the decision of the Subordinate Judge was also of such a character as made a second appeal to this Court incompetent under section 153. That decision, when analysed, cannot rightly be regarded as an authority for the general proposition that if an appeal has been heard without jurisdiction, no appeal lies against the appellate decree. The observations in *Amrita Lal Mukherji v. Ram Chandra Roy* (2), are also capable of a similarly limited interpretation. On the other hand, we have the decision in *Abdul Hossain v. Kasi Shahu* (3) where this Court heard an appeal against an appellate decree made without jurisdiction, and reversed the decision of the Court of appeal below. That the Court was competent to do so, is plain from the decision of the Judicial Committee in *Meenakshi Naidoo v. Subramaniya Sastri* (4). We have finally the decision in *Ranjit Misser v. Ramudar Singh* (5) in which this very question was discussed and the rule was laid down that where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction : see also *Jwala Prasad v. Salig Ram* (6), *Walayat v. Ramlal* (7). A decree made without jurisdiction possesses none the less the quality of a decree as between the parties thereto, and, if there is a statutory appeal from decrees made in suits of that character, the decree does not become unassailable, because it has been made without jurisdiction. That an appeal lies against a decree made without jurisdiction is, indeed, also clear from the terms of sections 99 and 115 of the Civil Procedure Code. In the case before us, as the Subordinate Judge had decided a question of interest in the land as between parties having conflicting claims thereto, an appeal did

(1) (1908) 12 C. W. N. 835.

(2) (1901) I. L. R. 29 Calc. 60.

(3) (1899) I. L. R. 27 Calc. 362.

(4) (1887) L. R. 14 I. A. 160.

(5) (1912) 16 C. L. J. 77.

(6) (1891) I. L. R. 13 All 575.

(7) (1914) 12 All. L. J. 1113.

lie to this Court against his decrees, under the express provisions of section 153; it is difficult to appreciate how that appeal could be nullified, because the decree was vitiated by absence of jurisdiction in addition to other possible errors. I am clearly of opinion that the decision of this Court passed in appeal was consequently erroneous and that this Court should have reversed the decision of the District Judge on the ground that it had been passed without jurisdiction. This application for review must accordingly succeed and the decision of this Court set aside.

The result of our order is that the appeal to this Court stands revived for disposal under Order 47, Rule 8, Civil Procedure Code. For reasons already assigned, that appeal must be allowed, the decree of the lower appellate Court discharged and that of the Court of first instance restored. But the question arises, what further course, if any, should be adopted in the interest of justice. It is plain that the decision of the trial Court was liable to be revised by the District Judge under section 153 of the Bengal Tenancy Act. As a matter of fact, an application for revision was presented to him; but when the appeal succeeded, the application was abandoned. Now that it has been held that the appeal was incompetent, the plaintiff should clearly be allowed to fall back upon the application, which may be deemed to stand revived; it will consequently be open to the District Judge to proceed on the basis of that application and to make such order as he is competent to pass under section 153 of the Bengal Tenancy Act.

On these grounds I agree with the order proposed by the Chief Justice in this matter.

D. K. R.

Review allowed; case sent back.

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APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice Cuming.

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18, 19 and
August, 22.

TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

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CHANDRA KANTA GHOSH.*

Calcutta Improvement Act (V of 1911 B. C.), preamble, sections 2, 36, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 52, 68, 69, 78, 81, 82, 83, 84, 88, 89, 122, 123, 124, 125, 155, 156 and 160 and Schedule—Calcutta Municipal Act (III of 1899 B. C.), section 3 (37)—Land Acquisition Act (I of 1894), sections 6 (3) and 23—Indian Councils Act, 1861 (24 and 25 Vict. Ch. 67), section 43—Recoupment—Taxation—Finance—Acquisition, by agreement—Acquisition, compulsory—Acquisition, abandonment of—Surplus land, disposal of—Affected—Lay out—Relay out—Providing building sites—Jurisdiction—Sanction, notification of—Duly framed and sanctioned—Street—Area—Suit, bar of—Civil Court, jurisdiction of—Trustees, powers of—Ultra vires—Statutes, construction of—Executive authorities—Legislature, delegation by, to executive—Improvement scheme.

The Calcutta Improvement Act does not authorize the Trustees to acquire land compulsorily for the purpose of recoupment. Section 69 is the only provision in the Act for compulsory acquisition and under that section land can be compulsorily acquired only for carrying out any of the purposes of the Act. Recoupment is not one of the purposes of the Act which are enumerated in the Preamble and are formulated in detail in sections 36, 39 and 52.

Sections 41, 42, 78, 81, 122 and 123 do not by necessary implication authorize the compulsory acquisition of land for recoupment.

Sections 41 and 42 specify matters which must or may be provided for, in an improvement scheme; they do not confer a right to acquire land compulsorily.

Sections 78 and 81 treat of abandonment of acquisition of unnecessary land and disposal of superfluous land respectively; neither section creates a right to acquire land compulsorily.

Sections 122 and 123 relate to methods of account and do not touch the question of right of compulsory acquisition for recoupment.

The trustees are not competent to initiate a street-scheme for one of the purposes mentioned in section 39 and specified in their resolution, and then proceed with the scheme as if they had assumed jurisdiction for a different purpose.

The area which is intended to be benefited by a street-scheme must be first determined under section 39, and then the scheme has to be drawn up with

* Appeal from Original Decree No. 416 of 1915 against the decision of Babu Umesh Chandra Chakrabarti, Subordinate Judge, 24 Pergannas, dated the 10th August, 1915.

reference to the elements mentioned in section 40. The area so determined is larger than the land to be acquired for the execution of the improvement works.

The expression 'providing building sites' in section 39 means making it possible to use as building site land which cannot be now used as building site ; it does not mean buying up land already fit for building site, pulling down houses existing thereon and selling the land at a profit for erection of buildings.

The expression 'laying out or relaying out' in section 41(b) cannot apply to the entire land comprised in the area intended to be benefited by a street-scheme.

The expression 'Street' does not include the abutting lands on both sides and the houses thereon, as it does in the English Local Government Act, 1858 ; it has the same meaning as in section 3(37) of the Calcutta Municipal Act.

The term 'affected' in section 42(a) means neither 'beneficially affected or improved in value' nor 'prejudicially affected or impaired in value', but signifies 'acted upon physically or materially.' Land is affected by the execution of an improvement scheme within the meaning of section 42(a) when by the construction of the improvement works, there is a physical interference, with any right, public or private, which the owner is entitled to exercise in connection with that property.

Section 49(2) does not bar the jurisdiction of the Civil Court to determine whether the Trustees have or have not acted in violation or excess of statutory authority. As sections 155 and 160 show, section 49 does not bar suits of all descriptions ; it merely shows that after the publication of the notification of sanction by the Local Government, it must be assumed that the scheme has been framed and sanctioned duly, that is, in conformity with the procedure prescribed by the Act.

Section 156 does not apply to a suit brought not because of an act done but for the purpose of an injunction to restrain an act threatened to be done.

The term 'acquisition' does not necessarily mean compulsory acquisition under the provisions of the Land Acquisition Act ; sections 68 and 69 indicate the distinction between acquisition by agreement and compulsory acquisition.

In any concrete case, if the competence of the Board to compulsorily acquire land, is called in question, the test to be applied is, whether the land is proposed to be acquired for carrying out one or other of the purposes of the Act as indicated in the Preamble and developed in sections 36, 39 and 52.

Mode of construction of Statutes which confer on a corporation extensive powers of interference with private rights explained. Where the objects of the Statute do not obviously imply such an intention, it must be presumed that the Legislature does not desire to confiscate private property or to encroach upon private rights ; it is expected that if the Legislature intended to confer on the executive authorities unlimited powers of interference with private rights, it would manifest its intention plainly in express words, at any rate by clear and necessary implication.

Distinction between acquisition for recoupment and taxation for purpose of recoupment explained. When a proposed acquisition is abandoned on condition of periodical payment by the owner of a sum fixed in perpetuity or the payment in

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lump of the capitalised value thereof, a tax is in essence imposed on the land ; such a tax can be validly imposed only with the sanction of the proper authorities duly obtained under section 43 of the Indian Councils Act, 1861, and the Statute imposing the burden must do so in clear and unambiguous language.

Proper use of judicial precedents explained ; they are of value only in so far as they enunciate principles. No useful purpose is served, when a question arises as to the construction of an Act, by reference to judicial decisions on the meaning of other Acts which, though similar in scope and purpose, are couched in different terms and provide machinery of a different type to carry out their objects.

Appeal by the Defendants.

Suit for Injunction.

The material facts and arguments are fully set out in the judgment.

Sir S. P. Sinha, Mr. Langford James, Mr. G. B. McNair and Babu Ambikapada Chaudhuri for the Appellants.

Messrs. B. Chakrabarti and B. K. Lahiri and Babus Dwarka Nath Chakrabarti, Girijaprasanna Ray Chaudhuri, Ramgati Sarkar, Milkanta Ghosh and Prakas Chandra Pakrasi for the Respondent.

C. A. V.

The Judgment of the Court was delivered by

August, 22.

Mookerjee J.—This appeal is directed against a decree made in favour of the plaintiff-respondent, in a suit instituted by him against the Trustees for the Improvement of Calcutta. The allegations in the plaint, which form the basis of the claim, may be briefly summarised. The plaintiff is the owner of premises No. 40-10 Chaulpati Road within the Municipal limits of Calcutta, recently sub-divided into Nos. 40-10 and 40-10-1. The area comprised therein is more than one and a half Bighas and is situated at a distance of about 125 feet away to the west of the present Russa Road, whereof Chaulpati Road is a branch. Since his purchase of the land, the plaintiff had filled up a large tank that lay within the boundaries thereof, had raised its level and made it fit for building purposes, had constructed, with the sanction of the Municipal Corporation, a two-storied building on a portion of the land, and had collected materials for the erection of other suitable buildings thereon. While the plaintiff was thus in occupation and enjoyment of his land, the Trustees framed a street-scheme under the provisions of the Calcutta Improvement Act 1911 for the purpose of widening Russa Road and published the same on the 13th November 1912 in the Calcutta Gazette. The list of properties proposed to be acquired under this

scheme included a major portion of the abovenamed premises, although the lands would lie about 55 feet away from the western border of Russa Road even after it had been widened to a breadth of 100 feet as proposed. Objections to the scheme were invited under Section 43, and special notice was issued under Section 45 of the Calcutta Improvement Act, 1911. The plaintiff thereupon submitted his objections which, he asserts, were overruled by the Board of Trustees without consideration and examination. The Trustees next submitted the scheme to the Local Government for sanction under Section 48. The sanction was notified in the Calcutta Gazette on the 21st January 1914; since then, the Trustees had taken steps preliminary to the acquisition of the land and had deputed officers to make a survey and prepare plans thereof. The plaintiff alleges that the proceedings adopted by the Trustees with a view to acquire his lands were illegal and *ultra vires*; that they had in fact acted in excess of Statutory authority, that the inclusion of extensive surplus lands in the scheme had been made, not *bona fide* for the purposes of the Act, but with a view to make profit by the sale thereof, and that there was no justification in law for the acquisition of the disputed lands under colour of providing building sites, as the lands already constituted a good building site. On these allegations, the plaintiff asked for a declaration that the defendants Trustees had no power to acquire the lands in suit in pursuance of the Russa Road widening scheme, and that their acts in this behalf were *ultra vires* and illegal; he accordingly prayed that the defendants, their servants and agents, might be restrained by a perpetual injunction from interfering in any way with the plaintiff in his possession and enjoyment of the lands in suit. The Trustees put the plaintiff to the proof of his claim. They contended that it was not competent to the plaintiff to question the scheme or any portion thereof after notification of the sanction of the Local Government; they further asserted that the lands were required for the execution of the scheme and were affected by the execution of the scheme, and that they were competent, in the exercise of their statutory powers, to take steps for the compulsory acquisition of the land. An objection was also taken that the suit was not maintainable without notice under Section 155. The Subordinate Judge overruled these contentions and came to the conclusion that the action of the Trustees in including the land in suit within the scheme area on the basis of the resolution with which they started was *ultra vires* and void. He consequently granted an injunction which directs the Trustees to refrain from the acquisition of the land

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in suit for the purposes of the Russa Road widening Scheme. The Trustees have appealed to this Court, and on their behalf the Advocate-General has contended that the decree of the Subordinate Judge should be discharged on the following grounds, namely, *first*, that the intended acquisition of the lands with a view to recoupment, that is, to enable the Trustees to recoup themselves in whole or in part the costs of the scheme, is an act authorised by the Calcutta Improvement Act, 1911; *secondly*, that the lands are required for providing building sites within the meaning of section 39(a) and are consequently liable to compulsory acquisition; *thirdly*, that the lands are required for the purpose of laying out or re-laying out within the meaning of section 41(b), and, are, accordingly proper subject matter of compulsory acquisition; *fourthly*, that the lands will be affected by the execution of the scheme within the meaning of section 42(a) and have accordingly, been properly included for acquisition by the Trustees in the exercise of their statutory discretion; and, *fifthly*, that the suit is not maintainable, as under section 49(2), the publication of the sanction of the Local Government is conclusive evidence that the scheme has been duly framed and sanctioned. The questions mooted are of first impression and their determination depends primarily upon the construction of various provisions of the Calcutta Improvement Act, 1911, which must be interpreted as a whole and not isolated from each other. We shall accordingly first analyse the scheme of the Act and examine its principal provisions in so far as they are relevant for the decision of the questions raised before us.

The Preamble to the Act, which is described as "an Act for the improvement and expansion of Calcutta," consists of four paragraphs. The first paragraph enumerates the objects of the Act, namely,

(A) The improvement and expansion of Calcutta by—

(a) Opening up congested areas,

(b) Laying out or altering Streets,

(c) Providing open spaces for purposes of ventilation or recreation,

(d) Demolishing or constructing buildings,

(e) Acquiring land for the said purposes.

(B) The re-housing of persons of the poorer and working classes displaced by the execution of improvement schemes.

This is followed by the words "and otherwise as hereinafter appearing," which are by no means easy to construe with what precedes; they are, we think, intended to be read with the phrase "to

make provision"; if this be the true meaning, the term "otherwise" may be taken as equivalent to "in other ways," or, "in other respects," or "with regard to other points" which are given in the Oxford Dictionary as significations of the word.

The second paragraph of the Preamble recites the expediency of the constitution of a Board of Trustees invested with special powers to carry out the objects of the Act.

The third paragraph of the Preamble recites that sanction of the Governor-General had been obtained, under section 5 of the Indian Councils Act, 1852, to such of the provisions as affect Acts passed by the Governor-General of India in Council.

The fourth paragraph of the Preamble recites that the sanction of the Governor-General had been obtained, under section 43 of the Indian Councils Act, 1861, to the enactment of the provisions of the fifth Chapter which relate to Taxation.

It is worthy of special note that acquisition of land for purposes of recoupment is not specified as one of the objects of the Act, though acquisition of land for the purposes enumerated above as (a), (b), (c), (d) is expressly mentioned. The Advocate-General, with characteristic candour, conceded that he could not support the position that acquisition of land for purposes of recoupment is one of the objects of the Act, though it may be one of the means to attain the objects of the Act.

The Act is divided into eight Chapters. Section 2, which finds a place in the first Chapter, contains definitions of terms. Clause (f) lays down that, unless there is anything repugnant in the subject or context, the expression "improvement scheme" means a general improvement scheme or a street scheme or both. Clause (n) lays down that the expression "public street" has the same meaning as in clause 37 of section 3 of the Calcutta Municipal Act, 1899.

The second Chapter makes provision for the constitution of the Board of Trustees, the conduct of business by them and the appointment and status of their officers and servants.

The third Chapter, which treats of improvement schemes and re-housing schemes, comprises sections 36 to 67. Sections 36 and 39 read together show that improvement schemes are of two kinds, namely, general improvement schemes and street schemes, while section 52 shows that, in addition to these two classes of schemes, there may be re-housing schemes. We are not concerned in the case before us with either a general improvement scheme or a re-housing scheme, and we need, consequently, examine in detail only

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the provisions applicable to a street scheme. The first stage in a street scheme is described in section 39 which is in these terms :

“Whenever the Board are of opinion that for the purpose of—

(a) providing building sites,

Or,

(b) remedying defective ventilations,

Or,

(c) creating new, or improving existing means of communication and facilities for traffic,

Or,

(d) affording better facilities for conservancy,

it is expedient to lay out new streets or to alter existing streets (including bridges, causeways and culverts), the Board may pass a resolution to that effect, and shall then proceed to frame a street scheme for such area as they may think fit. The first step in a street scheme is, consequently, taken, when the Board passes a resolution that it is expedient to lay out a new street or to alter an existing street, because the Board are of opinion that such a course is requisite for one or more of the four purposes enumerated in clauses (a), (b), (c), (d) of section 39. The second stage in a street-scheme is also described in section 39, namely, the second step is taken when, after the resolution has been passed, the Board proceed to frame a street-scheme for such area as they may think fit. It is obvious that before the scheme can be actually framed, the area must first be determined ; such area is clearly the area which the Board, in their discretion, think should be improved by the carrying out of the purpose set forth in their resolution. Section 40 specifies the matters to be considered when an improvement scheme is framed in respect of any area. It is plain that when a street-scheme is framed under section 40 in respect of an area previously determined upon under section 39, regard must be paid to the three points mentioned in the section with reference to the particular purpose specified in the resolution of the Board passed under section 39. The three points specified in section 40 are :

(a) the nature and the conditions of neighbouring areas and of Calcutta as a whole ;

(b) the several directions in which the expansion of Calcutta appears likely to take place ; and,

(c) the likelihood of improvement schemes being required for other parts of Calcutta,

There can be no dispute that the consideration of these matters will lead to different results according as the purpose specified in the resolution of the Board is one or other of those mentioned in section 39; for example, if the object be the remedying of defective ventilation, the consideration of the matters mentioned in section 40 may lead to conclusions very different from what would be reached if the purpose were the affording of better facilities for conservancy. It may also be incidentally observed that clause (a) of section 40, which renders it obligatory on the Board to pay regard to the nature and the conditions of neighbouring areas, shows that the area for which the street scheme is to be framed must have been previously determined; it would be unmeaning otherwise to speak of "*neighbouring areas*." Sections 41 & 42 specify respectively matters which must be and which may be provided for in improvement schemes. Clause (a) of section 41 lays down that every improvement scheme shall provide for the acquisition by the Board of any land in the area comprised in the scheme which will, in their opinion, be required for the execution of the scheme. Two points require to be noted in connection with this clause. *First*, the term "acquisition" does not necessarily mean "compulsory acquisition under the provisions of the Land Acquisition Act." This is clear from sections 68 & 69, which refer respectively to acquisition by agreement and compulsory acquisition. *Secondly*, the area comprised in the scheme is obviously larger than the land to be acquired as required for the execution of the scheme; in other words, the land required for what may be called the engineering works forms a part only of the area for which the improvement is made. Clause (b) of section 41 lays down that every improvement scheme shall provide for the laying out or relaying out of the land in the said area, (that is, the area comprised in the scheme) There has been much discussion at the Bar as to the precise meaning of the expressions, "lay out land" and "re-lay out land." These expressions do not appear to have been used as words of art or technical words. The expression "lay out" is explained in the Oxford Dictionary Vol. VI, Page 131 to mean "to plot or plan out," "to plan or map out," "to apportion for a purpose." The expression "relay out" can be fittingly applied only to land which has been previously laid out. It is obvious that these expressions must be interpreted in view of the requirements of the particular scheme in hand, which may be a general improvement scheme undertaken for one or more of the reasons specified in section 36, or a street-scheme undertaken on one or more of the grounds enumerated in section 39. For instance, it is conceivable that in

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the case contemplated in section 36 (b) (1) a large tract of land may come within the operation of a general improvement scheme, which may provide for demolition of the buildings and for laying out the land for reconstruction of buildings. In our opinion, clause (b) of section 41 lends no support to the theory that in every improvement scheme, for whatever purpose undertaken, the entire area comprised in the scheme must be acquired and relaid with the exception of the area actually required for the engineering works. Section 42 specifies matters which may be provided for in improvement schemes. Clause (a) lays down that any improvement scheme may provide for the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme. Three points require to be noted in connection with this clause, which is the counter-part of clause (a) of section 41. *First*, the term "acquisition" as already observed in connection with section 41 (a), does not necessarily mean "compulsory acquisition"; *secondly*, the land to be acquired is smaller than the area comprised in the scheme; *thirdly*, the land must be such as will, in the opinion of the Board be *affected by the execution of the scheme*. There has been much controversy at the Bar round the expression "affected." On behalf of the Trustees, the Advocate-General has maintained that the term "affected" means "beneficially affected" so that the Trustees are entitled to acquire compulsorily any land in the area comprised in the scheme, if they are of opinion that the land will be benefited by the execution of the scheme. This argument is based upon the fallacious assumption that section 42 authorises compulsory acquisition of land; as we have seen, it does nothing of the kind. But, apart from this, the question does arise, what is the meaning of the expression "affected by the execution of the scheme." The plaintiff-respondent contends that the term "affected" means "injuriously or prejudicially affected." The appellants contend, on the other hand, that the term signifies "beneficially affected." There can be no doubt that the term "affected" taken by itself is colourless and is equivalent to "acted upon"; but, as pointed out in the Century Dictionary, the word is generally used to convey the sense of "acted upon or influenced injuriously"; for instance, if one were to say that "his health has been affected by the climate of India," the obvious meaning would be that "his health had been impaired and not improved." In our opinion, the word "affected" is a word capable of a very large meaning, a word not of art but of ordinary English, which must be interpreted with reference to the context. We think that

in section 42 it means neither "beneficially affected or improved in value" nor "prejudicially affected or impaired in value," but signifies "acted upon physically or materially." This, in fact, is one of the recognised meanings given in the Oxford Dictionary, Vol. I, page 153. There is an instructive discussion of the meaning of the term "affected" in the case of *Metropolitan Board of Works v. McCarthy* (1), to which reference may usefully be made in this connection. Land may well be said to be "affected by the execution of a scheme" within the meaning of section 42 (a), when, by the construction of the improvement works, there is a physical interference with any right, public or private, which the owner is entitled to exercise in connection with that property. The interpretation suggested by the Trustees, namely, that "affected" means "beneficially affected," that is, "benefited," leads to a curious result. The expression "area comprised in the scheme" in section 42 (a) is clearly the area for the benefit of which the street scheme is made under section 39; presumably, therefore, every inch of land within the area so determined upon under section 39, will be benefited, or to use the expression coined by the appellants, "beneficially affected" by the execution of the scheme. How can it then be appropriately said as section 42 (a) does, that the Board may select for acquisition such land only in the area comprised in the scheme as will, in their opinion, be affected by the execution of the scheme; the contention of the appellants practically is that the Trustees can acquire any or all land in the area, for the whole area would be benefited by the scheme. We are clearly of opinion that we should not adopt the forced and unnatural construction put forward by the appellants. The effect of that interpretation is that under section 39, the Board may, in the first instance, arbitrarily fix the area which, in their opinion will be benefited by the proposed improvement scheme, and, then proceed, under section 42 (a), equally arbitrarily, to take away all land within such area from private owners on the plea that the lands will be benefited by the execution of the contemplated improvement scheme. On the other hand, the section is at best an enabling provision; it gives no power of compulsory acquisition, though it may possibly authorise the Board to acquire land by private agreement. The interpretation we adopt puts a reasonable construction upon the section; it limits the application of the provision to cases of all lands within the area of the scheme, where by the execution of the scheme, that is by the construction of the improvement works, the

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lands will be affected, that is, in respect of those lands, there will be a physical interference with a right, public or private, which the owner is entitled to exercise in connection therewith. The reason for such a provision is not far to seek. Although the provisions of the Land Acquisition Act have been materially modified in various particulars in their application to cases of acquisition of land for the purposes of the Trust, clauses (3) and (4) of section 23 (1) have been left untouched. Consequently, in cases of acquisition for the Trust as in all other cases, the owner of the land acquired is entitled to damages for what are compendiously described as "severance" and "injurious affection." The Board are placed in a position to escape from the payment of such damages by section 42 by including in their scheme the lands which will be affected by the execution of the scheme. It is obvious that when a reasonable interpretation of section 42 is possible, we should not adopt the construction suggested by the Trustees, which is not only not in accordance with the plain and natural meaning of the words used by the Legislature, but will also result in vesting the Board with arbitrary and unlimited powers of interference with private rights.

Section 43 describes the procedure for preparation, and publication, of notice as to the improvement scheme and its transmission to the Chairman of the Calcutta Municipal Corporation and of other Municipalities. Section 44 provides for the submission of representations to the Board by Municipalities. Section 45 provides for service of notice on owners of land as to the proposed acquisition of their land for executing the scheme. Section 47 requires the Board to consider objections, representations and statements of dissent; the Board may then either abandon the scheme or apply to the Local Government for sanction to the scheme with such modifications, if any, as the Board may consider necessary. Section 48 authorises the Local Government to sanction, either with or without modification, or to refuse to sanction, any improvement scheme submitted to it under section 47. The first clause of section 49 requires the Local Government, when an improvement scheme has been sanctioned, to announce it by notification. The second clause of section 49 defines the effect of the publication of such notification in these terms: "the publication of a notification under sub-section 1, in respect of any scheme, shall be conclusive evidence that the scheme has been duly framed and sanctioned." Section 50 authorises the Board to alter a scheme after it has been sanctioned by the Local Government, and describes the mode of exercise of such power; in particular, we may note that clause (b)

of the Proviso requires that if the alteration involves the compulsory acquisition of further land, a fresh application has to be made to Government after compliance with the prescribed preliminaries. The remaining sections of the third Chapter deal with topics which do not bear directly on the questions in controversy in the present case.

The fourth Chapter deals with the subject of acquisition and disposal of lands. Sections 68 and 69 show that the acquisition may be either by agreement between the Board and the proprietor of the land or by compulsory proceedings taken at the instance of the Board under the provisions of the Land Acquisition Act, which are modified in important particulars by section 71 read with the schedule to the Act. As regards *compulsory* acquisition, the fundamental point to be borne in mind is that the Board is authorised, not to acquire whatever land they may choose, but only to acquire land *for carrying out any of the purposes of the Act*. This is manifest from the language used by the Legislature in section 69: "the Board may, with the previous sanction of the Local Government, acquire land under the provisions of the Land Acquisition Act, 1894, *for carrying out any of the purposes of this Act*." As has already been shown, the purposes of the Act are enumerated in the Preamble, and, consequently, in any concrete case, if the competence of the Board to compulsorily acquire a parcel of land is called in question, the test must be applied, whether the land is proposed to be acquired for carrying out one or other of the purposes of the Act. By no stretch of language can it be maintained that recoupment is one of the purposes of the Act; the Advocate-General, indeed, as previously stated conceded this position. Consequently, the Board is not competent *prima facie* under section 69 to acquire land compulsorily for recoupment. An ingenious attempt, however, has been made to evade this conclusion by a forced construction of several of the provisions of the Act which we shall hereafter consider. The only other provision in the fourth Chapter whereon stress has been laid by the Board is that contained in section 78. That section authorises the Board to abandon the acquisition of land in any area comprised in an improvement scheme, which is not required for the execution of the scheme; such abandonment is to be made in consideration of a sum of money which is to be paid by the owner of the land three years after the date of the agreement or is to constitute an outstanding charge on the land subject to payment of interest in perpetuity. It is plain that the provisions of Section 78 are applicable, only when the land is not required for the execution of the scheme, but

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is yet within the area comprised in the improvement scheme as sanctioned by the Local Government. The contingency contemplated may obviously happen when the Board, under section 50, alters the scheme after it has received the sanction of the Local Government under section 48 ; it may well happen that land which was originally intended to be acquired as necessary for the acquisition of the scheme may turn out to be not actually required for the execution of the scheme by reason of an alteration in the scheme made under Section 50 or it may also be by reason of some mistake in the original scheme itself. In such a contingency, section 78 comes into play. We have been invited, however, on behalf of the Trustees to hold that section 78 shows by implication that the Board are competent deliberately to include in their scheme lands which they know are not required for the execution of the scheme, solely with a view to make profit from the owner under Section 78. We are clearly of opinion that there is no foundation whatever for this contention. The argument in substance is that the Board are competent to seize whatever private property they may choose and include it in their scheme deliberately on purpose to levy contribution from the owner under section 78, though the Board are fully aware all the time that the land can never be required for the execution of the scheme. If the Legislature had intended to invest the Board with arbitrary and unlimited powers of interference with private property of this description, the object should and would have been carried out by the insertion of a clause suitably framed in that behalf. It is further clear that section 78 as interpreted by the appellants might in essence be regarded as a provision for the imposition of a tax on the subject and should, consequently, have found a place appropriately in the fifth Chapter after it had received the sanction of the Governor-General as required by Section 43 of the Indian Councils Act, 1861. We do not overlook the fundamental distinction between the power of the State to acquire private property for public purposes and the power to impose a tax upon its subjects. In the former case, the property ceases to be the property of the private owner, he is awarded compensation therefor, measured by the market value at the time of acquisition, and the loss he suffers is the prospective rise in value. In the latter case, the property continues to be the property of the private owner, but a burden is imposed upon him as his contribution to the cost of the benefit conferred upon his land by the improvement carried out in the locality. In a proceeding under section 78, if the application of the owner is refused and the land is acquired, no question of

taxation properly so called arises ; but it must be established beyond doubt that the Board have authority to deprive the owner of his land in this manner, that is, that the Board are competent to acquire the land under section 69 as required for carrying out one of the purposes of the Act. On the other hand, if the application of the owner under section 78 is granted and the proposed acquisition is abandoned on payment by him to the Trustees of the agreed sum or of interest thereon in perpetuity, a tax is in essence imposed on the land ; the truth of the matter in this event is that a sum periodically payable is exacted out of the land, unless the capitalised value thereof is paid within the prescribed period. In this view of the true scope of section 78, we cannot hold that the section was intended to be used as a cover for the arbitrary acquisition of private property for purposes of recoupment, such recoupment to be made either by way of levy of a lump sum from the owner or a periodical tax payable out of the property, or by way of acquisition of the land for profitable re-sale hereafter. Reference has also been made to section 81 which authorises the Board to dispose of land vested in or acquired by them under the Act. This does not imply, however, a power in the Board to acquire land compulsorily except for carrying out one of the purposes of the Act as provided in section 69 ; for there may obviously be occasion for the Board to dispose of what may be called surplus land, that is, land not required for the execution of the scheme, under various conceivable circumstances. It is hardly necessary to enumerate exhaustively the various modes in which superfluous land may come into the hands of the Trustees but instances will occur to everybody. Thus, land originally taken under the compulsory powers, may have been taken upon a wrong estimate or calculation of the quantity of land which would be required for a purpose for which it is afterwards found out, by experience, that less land than was originally supposed will be sufficient. Or, again, the Board may have been forced to take superfluous land under section 49 of the Land Acquisition Act by reason of wishing to take a part only of premises. There may also be instances where land taken originally and required originally for a scheme may turn out to be superfluous by reason of abandonment or modification of the scheme [See instances enumerated by Lord Cairns in *G. W. Ry. Co. v. May* (1)]. When it is thus possible to imagine cases of application of section 81, it would be wrong to infer therefrom a power of acquisition of land for purpose of recoupment. Consequently, neither in the case of

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section 78 nor in that of section 81 can we say that it necessarily implies a power of acquisition for recoupment, though the sections may come into operation where the power exists ; the essence of the matter is that there may be occasion for their use even if the power does not exist. As Ball J. said in *Dickson v. Pape* (1), "a necessary implication is not guess, not probability, but an inference which by no reasonable intendment can be otherwise ; it is a state of things excluding any reasonable conclusion but the one."

The fifth Chapter deals with taxation under three heads, namely, a duty on transfers of property situated within the limits of the Calcutta Municipality, a terminal tax on passengers by Railway and by Inland Steam Vessels and a customs duty on Jute exported by Sea from the Port of Calcutta. It is worthy of note that there is no provision for the imposition of a tax on property in Calcutta which may receive the benefit of and be enhanced in value by the improvements effected by the Board of Trustees. On the other hand, there are indications furnished by the evidence of the Chairman of the Trust that the Secretary of State for India in Council refused to accept a proposal to impose a tax by way of what is called frontage rates. The fact remains, at any rate, that only three taxes are imposed by the provisions of the fifth Chapter, and it would be against well-known rules of construction of Statutes to hold that another tax has been, by implication, imposed upon the subject ; the intention to impose a charge on the subject must be shown by clear and unambiguous language. [See the observations of Lord Brougham in *Stockton Ry. v. Barrett* (2), referring to *Hull Dock Co. v. Browne* (3)].

The sixth Chapter is devoted to Finance. Section 88 imposes an obligation upon the Calcutta Municipal Corporation to make a quarterly contribution to the funds of the Board subject to a minimum annual payment of seven and a half lakhs of rupees. Section 89 and the following sections authorise the Board to raise money by loans and to make consequential provisions for payment of interest thereon, for the institution of a sinking fund, and other like matters. The remaining sections of the chapter deal with the enforcement of liabilities, Budget estimates, Banking and investments and accounts. Reliance, however, has been placed upon clauses (c) and (d) of section 122 and clause (b) of section 123 as implying an authority in the Board to obtain funds for purposes of recoupment by acquisition

(1) (1845) 7 Ir. L. R. 107 (123).

(2) (1844) 11 Cl. & F. 590 ; 65 R. R. 261.

(3) (1831) 2 Bar. & Ad. 43 ; 36 R. R. 459.

and re-sale of land. In our opinion, the sections mentioned throw no light whatever on the question in controversy ; they merely contain provisions as to the mode in which the accounts are to be kept ; this is clear from the circumstance that they find a place in that portion of the Chapter on Finance which is headed "accounts" and comprises sections 120 to 136. Reference may in this connection be made to clause (f) of section 122 which lays down that all lump sums received from the Government in aid of the Capital Account are to be credited to the Capital Account ; obviously this does not create a right in the Board to demand an aid from Government ; if such an obligation was intended to be imposed on the Government, an appropriate section would have been inserted in the sixth Chapter. This is made clear beyond dispute by reference to clauses (b) and (c) of section 124 which lay down that the proceeds of taxes imposed by the fifth chapter and the sums contributed from Municipal funds are to be credited to the Revenue Account. These provisions do not create a right in the Board to receive these sums ; the right is created by sections 82, 83 and 84 in the chapter on taxation and by section 88 in the chapter on Finance. Sections 122 to 125 merely prescribe the mode in which the accounts are to be kept ; an appeal to them to show that certain rights have been created in the Board is bound to be infructuous.

The two remaining Chapters comprise provisions as to the making of rules and supplemental provisions which do not throw any light upon the matters which arise for decision in this case. We shall now proceed to determine the questions in controversy in view of the exposition given above of the principal provisions of the Act.

The first contention advanced on behalf of the Trustees is to the effect that they were authorised by the provisions of the Act to compulsorily acquire the land in suit for purposes of recoupment. The Advocate-General has conceded that there is no provision in the Act which authorises in express terms the compulsory acquisition of land for purposes of recoupment and he suggested with almost cynical frankness that the Legislature had perhaps deliberately refrained from inserting in the Act an express provision to this effect with a view to avoid public clamour and criticism. He would seem to suggest, however, that the Legislature had at the same time conferred the requisite authority in this behalf on the Trustees, surreptitiously as it were, by so framing some of the provisions of the Act as to leave no room for escape from the conclusion that the Trustees possess the power by necessary implication. We are emphatically of opinion that an Act of the Legislature should not be interpreted on

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the assumption that the Legislature has indirectly accomplished what it did not venture to undertake openly and directly. This principle applies with special force to Acts which confer on a Corporation extensive powers of interference with private rights; the extent of the right of interference must be assumed to have been explicitly and accurately defined in the Act and we decline to hold that wider powers than what appear on the face of the Act have been conferred in disguise on the Board of Trustees. Section 69 authorises the Trustees compulsorily to acquire land *for carrying out any of the purposes of the Act*; recoupment is admittedly not one of the purposes of the Act which are outlined in unmistakable language in the Preamble and are formulated in detail in sections 36, 39 and 52. The conclusion follows that the Trustees have not been empowered to acquire land compulsorily for the purpose of recoupment. But it is said that the power may be spelt out of other sections of the Act. Assume that such a method of construction is admissible; what are the sections within which such a power is supposed to lie hidden? Reliance is placed upon sections 41, 42, 78, 81, 122 and 123. In our opinion, none of these sections is of any real assistance to the appellants. Sections 41 and 42, as already explained, deal merely with matters which must be or may be provided for when an improvement scheme is framed; they do not, directly or indirectly, authorise the compulsory acquisition of any land. It is further clear that clause (a) of section 41 refers to the acquisition of land required for the execution of the scheme, while section 78 authorises the abandonment of land not required for the execution of the scheme. It cannot reasonably be contended that section 41 entitles the Board to include in the scheme, land not really required for its execution, on the pretence that it is so required, merely with a view to enable the Board to make a profit by subsequent abandonment under section 78. The proceedings of the Board, no doubt, disclose that such a course was, at one stage, seriously advocated; but fortunately for the reputation of the Board, the good sense of the majority prevailed, and the Board escaped from what has been not very inappropriately described by Counsel for the Respondent as a process of blackmail in the shape of levy of "exemption fees." We are of opinion that section 41 (a) does not authorise compulsory acquisition of land for recoupment. Section 42 (a) also does not advance the contention of the Trustees in the least degree; that clause, as we have seen, authorises the inclusion, in the scheme, of land which will be affected by the execution of the scheme; this refers

to cases, where, by the execution of the scheme (that is, the construction of the contemplated works), there would be physical interference with any right, public or private, which the owner of the property is by law entitled to exercise in connection with such property. This clearly does not authorise the Board compulsorily to acquire any land they choose for the purpose of recoupment, on the assertion that the land is likely to be benefited by the proposed improvement and may consequently be taken away from the owner. Sections 78 and 81 also are of no avail, for, as has already been shown, they have no connection with the compulsory acquisition of land and provide merely for the abandonment of proposed acquisition of land or the disposal of land acquired under the Act. Sections 122 and 123 only regulate the mode in which the accounts are to be kept and do not sanction the compulsory acquisition of land. Section 69 accordingly remains the only section in the whole Act which deals with compulsory acquisition. There is thus no foundation whatever, in our opinion, for the contention that the Legislature has resorted to what has been called an indirect method to deprive private owners of their property, by provisions in the Act which effectively confer on the Board a disguised authority to acquire land compulsorily for purposes of recoupment. The Legislature has carefully provided for the finances of the Trustees; in addition to taxation, provision is made for Municipal contributions, loans and possible grants from the Government; if the Legislature had intended that profit from the acquisition and re-sale of land should be one of the recognised methods to aid the finances of the Trust, an express provision framed in suitable language would, no doubt, have found a place in the fifth or sixth Chapter. In the absence of such a provision, we must decline to read into the Act a clause of this character. It is well known that in the case of similar Statutes in England, the land which the corporation is authorised to acquire compulsorily is definitely set out either in a schedule to the Act or in a Book of Reference and Plans, and even then the corporation may only acquire what is necessary for the purposes of the Act. It does not seem probable that in the case of the Calcutta Improvement Act, the Trustees were by implication invested with unlimited authority compulsorily to acquire whatever land they might choose—not for the purpose of execution of the scheme itself but for the purpose of recoupment. Such interference with private rights is, it is indusputable, permissible only under statutory authority. The statute which is the source of the authority of the Trustees, does not, in express terms confer such powers on them,

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nor does it do so by obvious and necessary implication. It may not be unprofitable to consider for a moment what is the real position if the contention of the Appellants is sound. The Local Government are not entitled as such to interfere with private rights; so the State, in its legislative capacity, creates a Board of Trustees, and through them invests the Local Government with unlimited authority and unfettered discretion to interfere with private property; and it is seriously suggested that this result has been achieved by provisions in disguise, with a view to avoid criticism and comment which it is said would have been inevitably invoked by an explicit provision for this purpose. Now it need not be disputed that the Legislature has in times of peace, no less than in times of war, invested the executive authorities with extensive powers of interference with private rights; instances will readily occur to all familiar with modern legislation [*King v. Halliday* (1) which arose in connection with the Defence of the Realms Act, 1914, and *Ezra v. Secretary of State* (2), which arose in connection with section 6(3) of the Land Acquisition Act whereby a declaration by the Local Government that land is needed for a public purpose is made conclusive evidence of the existence of such purpose.] In all such instances, however, where unlimited powers of interference are intended to be conferred on the executive authorities, the Statute puts the matter plainly and beyond dispute. In this connection reference may usefully be made to the principle repeatedly recognised in a great variety of cases that where the objects of the Statute do not obviously imply such an intention, it must be presumed that the Legislature does not desire to confiscate the property or to encroach upon the rights of persons; it is expected that if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt: *Western Ry. Co. v. Windsor Ry. Co.* (3); *Commissioners v. Logan* (4); *Green v. R.* (5); *Sowerby v. Smith* (6); *Wells v. London Ry. Co.* (7); *Re Lundy & Co.* (8); *Exp. Jones* (9); *Randolph v. Milman* (10); *Randall v. Blair* (11); *Duke of Devonshire v. O'Connor* (12). In these circumstances, we are not prepared to

(1) (1916) 1 K. B. 738,

(2) (1902) I. L. R. 30 Calc. 36 confirmed on appeal to Judicial Committee
(1905) I. L. R. 32 Calc. 605; L. R. 32 I. A. 93.

(3) (1832) 7 App. Cas. 178 (188).

(4) (1903) App. Cas. 355.

(5) (1876) 1 App. Cas. 513.

(6) (1874) L. R. 9 C. P. 524.

(7) (1877) 5 Ch. D. 130.

(8) (1871) L. R. 6 Ch. App. 467.

(9) (1875) L. R. 10 Ch. App. 663.

(10) (1868) L. R. 4 C. P. 113.

(11) (1890) 45 Ch. D. 153.

(12) (1890) 24 Q. B. D. 373.

accept an interpretation of the Calcutta Improvement Act which is not the natural construction of its provisions and which involves the consequence that an unlimited right of interference with private rights for purposes of recoupment has been conferred upon the Trustees by means of provisions which do not directly at least disclose such an object. We hold accordingly that the Act does not authorise the Board of Trustees to acquire land compulsorily for purpose of recoupment.

The second contention put forward on behalf of the appellants is that the lands in suit are required for providing "building sites" within the meaning of section 39 (a) and are consequently liable to be compulsorily acquired. The plaintiff respondent answers that this plea is an after-thought and that there is no foundation for it either in law or in fact. We are of opinion that the contention of the appellants cannot possibly prevail. There is no room for controversy that the improvement scheme was initiated, not for the purpose of providing building sites under section 39 (a), but for improving existing means of communication and facilities for traffic under section 39(c). This is clear from the resolution of the Board passed on the 27th August, 1912 under section 39 in the following terms: "The Board are of opinion, after local inspection, that the Russa Road between Elgin Road and Hazra Road is too narrow to afford proper facilities for traffic and should be altered by being widened, and, therefore, resolve that a street-scheme be prepared to effect such widening." As already explained, the initial step in the assumption of jurisdiction by the Board is the passing of the resolution under section 39; it is obviously not a matter of form but of substance. We are surprised that in the case of a public corporation when action has been taken under the Statute on one basis, an attempt should be made to justify that action as if it had been taken for an entirely different purpose. The scheme before us as we know, was not initiated because the Board were of opinion that for the purpose of providing building sites, it was expedient to alter an existing street, namely, the Russa Road between the points where it is intersected by the Elgin Road and the Hazra Road respectively. It is patent that there is a fundamental difference between providing building sites and improving existing facilities for traffic. It is not competent to the Board to initiate a scheme on one of the grounds enumerated in section 39 and then to justify their action on the plea that the scheme might have been framed on the other ground; such evasion of compliance with statutory requirements is not permissible. It is further clear from the

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resolution of the Board passed on the 17th September, 1912 that the scheme was "to provide *only* for the widening of Russa Road and the taking up for recoupment purposes land unoccupied or occupied by buildings of small value." There was no assertion that the widening of Russa Road and the acquisition of lands on both sides thereof (though the road was to be extended on the western side alone) were *necessary* for providing building sites, although it was faintly suggested in the scheme outlined for the information of the public [Ex. I. page 6 ll. 2-5] that the land abutting on the widened road should be laid out in suitable building sites. It was only when doubts were raised as to the competence of the Board to take up land compulsorily for purposes of recoupment that the Board and their advisers found it convenient to rely upon the theory that the land in suit was *required* for providing building sites. The obvious answer is that that was not the purpose of the scheme. The respondent has also contended with considerable force that even if this were not so, even if it were competent to the Board to initiate a scheme for one purpose and then proceed therewith as if it were undertaken for a different purpose, still there is no question of *providing* a building site here. The land in suit is a good building site; a new building has been erected on a part of the premises and the remainder was about to be used in the same manner. It is plain that "*providing* building site" under section 39 (a) does not mean buying up land already fit for building site or pulling down houses and selling the land for building site; in our opinion, it means making it possible to use as building site land which cannot for various reasons, be now used as building site. In these circumstances, the plaintiff urges with good reason that it is not competent to the Board to seize his building site and re-sell it at a profit on the pretence of "*providing* a building site." There is little room for doubt that if the Board were permitted to take such a step under colour of statutory provisions, it would be an abuse of those provisions on the plea of nominal compliance therewith. We may observe incidentally that when the Board proceeded to frame the scheme after their resolution under section 39, they did not determine the area for which the scheme was to be framed; they merely determined the land which, they thought, should be acquired, and overlooked that the land to be acquired, though included in the area for which the street-scheme is framed, is not conterminous therewith; the area for the benefit of which the scheme is framed is plainly more extensive than the land required for the execution of the scheme. In our opinion, the assertion that the land in suit is required for

providing building site furnishes no answer to the claim of the plaintiff.

The third contention of the appellants is that the lands in suit are required for the purpose of lay out and are consequently proper subject matter of compulsory acquisition. Reliance is placed upon section 41(b) which requires that every improvement scheme shall provide for the laying out or relaying out of the land "in the said area," that is, in the area comprised in the scheme. Reference is also made to the decisions in *Baker v. Mayor of Portsmouth* (1), *Galloway v. Mayor of London* (2), and *Hendon Local Board v. Pounce* (3) to show that the word "street" includes the roadway as also the houses on both sides. In our opinion this contention of the appellants must be deemed groundless for more than one reason. *First*, it is plain that section 41(b) does not directly or indirectly relate to the acquisition of any land whether by private agreement or by compulsory process. *Secondly*, what is called "lay out" is not one of the objects of the Act as enumerated in the Preamble, nor even one of the purposes mentioned in section 39 for which a street-scheme may be undertaken. *Thirdly*, the contention if well-founded proves too much; for as section 41(b) requires that every improvement scheme shall provide for the laying out of the land in the area comprised in the scheme, according to the view maintained by the appellants, the entire land included in the area determined as the area to be benefited under section 39 must be acquired and laid out or relaid out as the case may be. *Fourthly*, a reference to the interpretation of the term "street" in the Local Government Act, 1858 can serve no useful purpose and can be of no real assistance in the determination of the meaning of the term "street" in the Calcutta Improvement Act, 1911. Section 2(n) shows that the expression "public street" has the same meaning as in section 3(37) of the Calcutta Municipal Act, 1899; according to that definition, the term "street" does not include either the abutting lands on both sides or the houses thereon. Section 41(b) only contemplates that the scheme shall provide for the lay out or relay out of such land in the area comprised in the scheme as may be validly acquired by or become otherwise vested in the Board. The section does not imply an obligation on the Board and corresponding authority on their part to acquire compulsorily all the lands situated in the area comprised in the scheme.

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The fourth contention of the appellants is to the effect that as

(1) (1878) 3 Ex. Div. 157.

(2) (1866) L. R. 1 H. L. 34 (55).

(3) (1889) 42 Ch. D. 602.

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the lands in suit will be "affected" by the execution of the scheme within the meaning of section 42 (a), they have been properly included for compulsory acquisition by the Trustees. There is no force in this argument ; indeed, the proceedings of the Board and the course of this litigation show that this is a rather belated argument ingeniously devised to meet the exigencies of the situation. *First*, section 42 (a) does not authorise the compulsory acquisition of any land. *Secondly*, these lands will in no way be "affected by the execution of the scheme," in the sense in which we interpret that expression. It is not disputed that the lands will lie a considerable way to the west of the widened Russa Road, and if they can be the proper subject matter of compulsory acquisition, there is no conceivable reason why lands even much further to the west should not be similarly acquired ; indeed, it is difficult to imagine where a line could be drawn, because all improvement schemes may in one sense be supposed to increase the value of all land in the city. There is this further difficulty in the present case that the Board did not, as we have already shown, determine under section 39 the area for the benefit of which the street-scheme was to be undertaken ; they have simply selected the lands which they desired to acquire. In our opinion, section 42 is of no assistance to the appellants.

The fifth contention of the appellants raises the question of the competence of the Civil Court to entertain this suit and to grant relief by way of injunction. Reliance has been placed upon section 49 (2) which provides that the publication of a notification under sub-section (1) that the Local Government has sanctioned a scheme shall be conclusive evidence that the scheme has been duly framed and sanctioned. The argument in substance is that this section deprives the Civil Court of jurisdiction to determine whether the action of the Board is or is not *ultra vires*. In our opinion, this contention is entirely groundless. Section 49 (2) merely provides that after the publication of notification of sanction, the scheme cannot be impeached on the ground that it has not been framed and sanctioned *duly*, that is, in conformity with the procedure prescribed by the Act ; but there is nothing in the section which takes away the jurisdiction of the Civil Court to investigate whether the action taken by the Trustees has or has not been in excess or violation of statutory authority. This follows from a plain reading of section 49 and is confirmed by sections 155 and 160, which would be entirely superfluous if section 49 (2) completely barred suits of all description in the Civil Court. This contention, consequently, must be overruled.

We may add that an objection was taken in the trial Court that the suit was barred as no notice had been given under section 156. This was overruled on the principle explained by Woodroffe, J. in *Ganoda v. Nalini* (1), namely, that a section which bars a suit for an act done, does not prohibit a suit for an injunction to restrain the commission of an act not done but threatened to be done. The correctness of this view has not been questioned in this Court, and the point, indeed, was not even so much as mentioned in the course of argument.

It may finally be observed that in the course of the elaborate arguments addressed to us on both sides, reference was made to judicial pronouncements upon the construction of other Statutes. Thus, the appellants relied upon the decisions in *Galloway v. Mayor of London* (2); *Lynch v. Commissioners of Sewers* (3); *Quinton v. Corporation of Bristol* (4); *Rolls v. School Board for London* (5) and *North London Railway Company v. Metropolitan Board of Works* (6), to show that authority had been conferred upon them to acquire land compulsorily for recoupment. The respondents, on the other hand, relied strongly upon the cases of *Thomas v. Daw* (7); *Gard v. Commissioners of Sewers of London* (8); *Donaldson v. Mayor of South Shields* (9) and *Denman v. Westminster Corporation* (10) as laying down principles which supported their view of the matter. No useful purpose is likely to be served by an analysis of these decisions and of the special provisions of the Statutes interpreted therein. It is at no time a profitable task to seek to interpret one Statute by reference to another Statute which however analogous in scope is still couched in different terms and possibly constitutes a machinery of an entirely different type to effectuate its purposes. We may in this connection bear in mind the weighty warning given by Lord Haldane in *Kreglinger v. New Patagonia Meat Co.* (11) against the abuse of judicial precedents; they are of binding force and of real guidance only in so far as they establish principles. What then are the true principles applicable to cases of this character; they will be found succinctly stated in paragraph 26 of the title on Compulsory Purchase

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(1) (1908) I. L. R. 36 Cal. 28.

(2) (1866) L. R. 1 H. L. 34.

(3) (1886) 32 Ch. D. 72.

(4) (1874) L. R. 17 Eq. 524.

(5) (1884) 27 Ch. D. 639.

(6) (1859) 18 L. J. Ch. 909; 1 Johnson 405.

(7) (1866) L. R. 2 Ch. App. 1.

(8) (1885) 28 Ch. D. 486.

(9) (1899) 79 L. T. 685; 68 L. J. Ch. 102 (162).

(10) (1906) 1 Ch. 464.

(11) (1914) App. Cas. 25 (40).

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of Land and Compensation contributed by Lord Alverstone and Mr. Allan to the Laws of England edited by Lord Halsbury (Vol. VI P. 25) :

"Municipal and other public bodies are sometimes given powers to take land beyond that which is necessary for the actual execution of the proposed works, in order that some part at least of the improved value of the adjoining lands may be secured in ease of the burden upon the ratepayers. These lands are said to be authorised to be taken for the purpose of "recoupment" as the public body is empowered to sell or lease them at what may be an enhanced value : *Galloway v. London Corporation* (1) ; *Quinton v. Bristol Corporation* (2). Similarly, public bodies may be allowed to acquire land which they may exchange for other land in order to carry out the intended object more effectually or economically : *Rolls v. London School Board* (3). If the Act clearly authorises the land to be taken for the actual works only, a local authority or other public body will be restrained from taking more than is actually necessary for such works [*Donaldson v. South Shields Corporation* (4)] but if it appears that it is the intention of the Act that the public body are to be allowed to reimburse themselves, they will then be at liberty to take all the lands delineated on the plans. On the other hand, when local authorities are authorised to take lands from time to time for specific works, such as street widening, and the land is not specified in the Act, they cannot in order by resale to reduce the expense to the ratepayers, take more than is *bona fide* necessary for the purpose : *J. L. Denman & Co. Ltd. v. Westminster Corporation* ; *J. C. Cording & Co., Ltd. v. Westminster Corporation* (5) ; *Fernley v. Limehouse Board of Works* (6)."

The substance of the matter, then, is that the object of the Legislature must be determined as expressed in the provisions of the statute ; it is not permissible to speculate about the unexpressed intentions of the Legislature ; nor are we concerned with the difficulties, real or imaginary which may arise from the adoption of the expressed intentions of the Legislatures. We have, from this point of view, analysed and examined in detail the provisions of the Act which is the sole source of authority of the Trustees, and we see no escape from the conclusion that under the powers of Compulsory acquisition defined in section 69, they are not competent to acquire land compulsorily except "for carrying out any of the purposes of

(1) (1866) L. R. 1 H. L. 34.

(2) (1874) L. R. 17 Eq. 524.

(3) (1884) 27 Ch. D. 639.

(4) (1899) 79 L. T. 685. C. A.

(5) (1906) 1 Ch. 464.

(6) (1899) 68 L. J. Ch. 344.

the Act," which do not include recoupment. It is of no avail to refer to decisions on English Statutes where the Legislature accurately defines the land, liable to fall within the operations of the Improvement authorities. It is remarkable that even under such conditions Lindley M. R. speaking on behalf of the Court of Appeal did not hesitate to hold in *Donaldson v. Mayor of South Shields* (1) that although the lands in dispute were included in the Book of Reference, which formed in essence a part of the Act, still he had failed, after the most dexterous manipulation of the sections, to extract from them anything like an enactment to the effect that the Corporation was at liberty to take lands simply for the purpose of enabling them to raise money, lands which they did not want for widening streets and for engineering purposes. Much stress was naturally laid before him on the decision of the House of Lords in *Galloway v. Mayor of London* (2); but the Master of the Rolls disposed of this argument in his characteristic way as follows: "If you have to construe a document which will not do what you want, see if you cannot find an authority which will." We may add that at the close of the arguments addressed to us, mention was made of the decision of Greaves, J. in *Manilal Singh v. Trustees for the Improvement of Calcutta* (3). From a perusal of that judgment it is plain that fundamentally important points of view, which have been placed before us were not laid before the Court in that case. A question may also possibly arise, whether, upon the special facts of that case, the actual decision may not be supported, apart from the reasons assigned in support thereof. But it would clearly be not fair to express an opinion upon the judgment in that case which is not binding upon us and may possibly form the subject of an appeal.

We hold for the reasons given above that the decree made by the Subordinate Judge is correct and that this appeal must be dismissed with costs.

D. K. R. ; S. C. R. C.

Appeal dismissed.

(1) (1899) 79 L. T. 685.

(2) (1866) L. R. 1 H. L. 34

(3) (1916) Suit No. 1253 of 1915, unreported.

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CRIMINAL REVISION.

Before Mr. Justice Chitty and Mr. Justice Walmsley.

BISESWAR CHAKRAVARTI AND OTHERS

v.

THE KING-EMPEROR.*

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March, 17.

Criminal Procedure Code (Act V of 1898), section 144, order under—Period, expiry of—Magistrate, if can extend the period—Proper procedure.

A Magistrate should not by successive orders under section 144 of the Code of Criminal Procedure extend the period of two months which clause (5) of that section prescribes.

In order to prevent any further difficulties in respect of the dispute between the parties the proper procedure to adopt is to commence proceedings against both the parties under section 107 of the Code.

Satis Chandra Roy v. The Emperor (1) referred to.

Revision under section 435 of the Code of Criminal Procedure.

On the report of the Sub-Inspector of Police, the Sadar Sub-Divisional Magistrate of Faridpur issued on the 18th December, 1915, an injunction under section 144 of the Code of Criminal Procedure, directing a bazar which the petitioners had started on their own property to be closed, and they were asked to show cause on the 3rd January, 1916. The learned Magistrate after hearing the parties made absolute, on the 13th January, 1916, the interim order of injunction which he had passed. The petitioners then moved the High Court on the 25th January, 1916, against the order passed by the learned Sub-Divisional Magistrate, and the High Court declined to interfere mainly on the ground that the order was about to expire. In the meantime another report having been submitted by the Police authorities to the effect that the petitioners had removed the bazar or *hat* to another site within half a mile of the old bazar, and that there was an apprehension of a breach of the peace in consequence, the learned sub-Divisional Magistrate on the 13th January, 1916, again issued an injunction against the petitioners for closing the new bazar, and directed them to show cause on the 28th January, 1916. The learned Magistrate after hearing the parties made, on the 16th February, 1916, the injunction order absolute, and ordered the matter to be put up again after two months. The learned Magistrate also started proceedings under section 107 of the Criminal Procedure Code against the petitioners

* Criminal Revision, No. 253 of 1916, against the order of Babu Naba Gopal Chaki, Sub-divisional Magistrate of Faridpur, dated the 16th February, 1916.

and several other persons on an apprehension of a breach of the peace relating to the same *hat*. The petitioners then moved the High Court against the order passed under section 144, Criminal Procedure Code on the 16th February, 1916.

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Bubu Manmatha Nath Mukherji for the Petitioners.

Babus Dasarathi Sanyal and *Hirendra Nath Ganguli* for the Opposite Party.

The judgment of the Court was as follows :—

In this case a Rule was issued calling on the District Magistrate to show cause why the order of the Deputy Magistrate passed under section 144 Criminal Procedure Code should not be set aside on grounds Nos. 1 and 3 in the petition mentioned. It would have been more correct had it been based on grounds 2 and 3. In this case the dispute is with regard to rival *hats*. The petitioners at the close of last year had started a rival *hat* on grounds belonging to themselves, which the Magistrate thought was likely to lead to a breach of the peace. He accordingly passed an order under section 144 Criminal Procedure Code on 18th December restraining them from holding a *hat* at that spot. This order would have expired on 18th February, 1916. The petitioners moved this Court towards the end of January, and we rejected the petition on the ground that the order of the Magistrate was about to expire, and that there was, therefore, no reason for an interference by this Court.* This was our chief, if not only, ground for declining to interfere on that occasion. Before that order expired the Magistrate proceeded to pass orders under the same section with regard to the new *hat*, the site of which the petitioners had shifted to other lands of their own. This order was passed on 13th January, 1916 and expired a few days ago. We are asked to interfere with it on the ground that the Magistrate in this case is doing what this Court has held that a Magistrate should not do, namely, by successive orders under section 144 Criminal Procedure Code extending the period of two months which clause (5) of that section prescribes. That the Magistrate has this object in view is clear from his orders in these cases. In passing the final order making the injunction absolute in this case on 16th February 1916, he noted "put up after two months." It is obvious that the Magistrate thought that his order dated from 16th February 1916 and that two months thereafter he might be in a position to pass a third order under this section. This is clearly improper. We need only refer to the case of *Satish*

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Chandra Roy v. The Emperor (1). The Magistrate states that he has already commenced proceedings against both the parties under section 107, Criminal Procedure Code. This is obviously the right procedure to adopt; but we are at a loss to understand why the Magistrate thinks that proceedings under that section will take such a long time before final orders can be passed. We see no reason why those proceedings should not be expedited, and orders passed immediately, so as to prevent any further difficulties in respect of these rival *hats*. We think that the present order now under consideration ought not to have been passed and we accordingly make the Rule absolute and set it aside.

A. N. R. C.

Rule made absolute.

(1) (1906 11 C. W. N. 79.

APPELLATE CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

CHANDRA KANTA CHAKRAVARTY

v.

RAM KRISHNA MAHALANOBISH. *

Permanent tenure—Rent, enhancement of—Bengal Tenancy Act (VIII of 1885), section 6, Cls. (a) and (b)—Continuity of tenure.

The continuity of a transferable tenure is not affected by sub-division or by consolidation.

Hills v. Huro Lall (1) and *Kazee Khoda v. Nubo* (2) referred to.

Uday v. Nripendra (3) doubted and distinguished.

Appeal by the plaintiff.

Suit for enhancement of rent.

Shortly after the Permanent Settlement had come into force, the disputed land was sold by the then tenure-holder to the predecessor in interest of the defendant, on the allegation that the rent proportionately payable in respect of the land conveyed was Rs. 19 and odd. The purchaser, thereupon, went to the proprietor, and in order to secure a recognition as a separate tenure-holder, obtained from him a *sanad*, which recited the conveyance, and entitled him to continue in occupation on payment of the amount of rent mentioned from generation to generation. The landlord contended that this *sanad* created a new tenure, while the contention of the tenant was that there was no breach in the continuity of the pre-existing tenure. The Courts below held that as the tenure was held from the time of the Permanent Settlement, the rent could not be enhanced. Against that decision, the plaintiff appealed to the High Court.

Babus Jogesh Chandra Roy and *Sasanka Jiban Roy* for the Appellant.

Babu Gobinda Chunder Dey Roy for the Respondent.

* Letters Patent Appeal No. 49 of 1914, against the decision of Mr. Justice D. Chatterjee, dated the 3rd April, 1914 in Appeal from Appellate Decree No. 2284 of 1911, against the decision of C. H. Mosely Esq. Additional District Judge of Mymensing, dated the 18th April, 1911, confirming that of Babu Satis Chunder Bose, Munsiff, 1st Court of Kishoregung, dated the 14th March, 1910.

(1) (1865) 3 W. R. Act X. Rul. 135.

(2) (1866) 5 W. R., Act X. Rul. 53.

(3) (1909) I. L. R. 36, Calc. 287; 13 C. W. N. 410.

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The following judgment was delivered by

D. Chatterjee, J.—I have no doubt that, upon a proper construction of the *sanad* produced in this case, the tenure existing from before the Permanent Settlement was continued. The court of appeal below is, therefore, right.

It is contended that there was a reduction coming within clause (b) of section 6 of the Bengal Tenancy Act. This contention is based upon a dowl, Ex. D, dated 1204 which was adduced in evidence by the defendant in a previous case but notwithstanding which the decree was made at the full rate of Rs. 19 odd. There is no evidence or finding that the tenure-holder has ever received any reduction of his rent from his landlord and it is admitted that, in the previous rent suit in which the dowl in question was filed by the defendant, the decree was passed by the court of appeal at the rate claimed by the plaintiff and not at the reduced rate mentioned in the dowl which was found to be suspicious in that case. In this view of the case, I do not think that there is any substance in this ground of appeal.

The appeal is therefore dismissed with costs.

Against this decision, the plaintiff preferred an appeal under section 15 of the Letters Patent.

Babu Sasanka Jiban Roy for the Appellant.

Babu Gobind Chunder Dey Roy for the Respondent.

June, 1.

Sanderson, C. J.—In this case I think that the appeal should be dismissed. The whole question, in my opinion, turns upon the construction of the *sanad* which is to be found at page 19 of the paper-book. If by that, a part of the *taluk* which was existing at the date of the Permanent Settlement was assigned to the defendant's predecessor, then the plaintiff had no case. On the other hand, if there was a new tenure created at a new rate of rent, different from that which was applicable to the *taluk* which was existing before that date, then the plaintiff had some case for consideration.

The question depends upon section 6 of the Bengal Tenancy Act, which says that where a tenure has been held from the time of the Permanent Settlement, its rent shall not be liable to enhancement except on proof of certain matters mentioned in that section.

Now, looking at this *sanad*, it seems to me that there had been before the date of it a *taluk* in a certain village the rent of which was Rs. 125-15-1, in respect of certain lands which in themselves had been curved out of a larger tenure, the word used being *taksim-jama*.

Then by this transaction it appears that the *talukdars* of that particular village had assigned a portion of the *taluki* right to the defendant's predecessor, and they assigned it subject to the confirmation by the superior landlord. That confirmation was given by the document which is now before us. It recites that the *talukdars* assigned a part of their *taluk* and at a particular rate of rent which in my opinion must be assumed to be the same rate at which the larger *taluk* had been held by the *talukdar*. Therefore, in my judgment the learned Judge of this court and the learned Judge of the first Appellate Court were right in holding that there was no new tenure created but that there was an assignment of part of the old tenure; and, therefore, this tenure was one that had been held from the time of the Permanent Settlement.

Then it is said that the plaintiffs can rely upon sub-section (b) of section 6 of the Bengal Tenancy Act because, they say, the tenure-holder has received a reduction of his rent. Upon that point I agree with what was said by Mr. Justice Digambar Chatterjee and I do not think it necessary to add any thing further to what he has said.

For these reasons I think the appeal should be dismissed with costs.

Mookerjee J.—I agree that the judgment of Mr. Justice Digambar Chatterjee, which affirms the concurrent decisions of the Courts below, takes a correct view of the rights of the parties, and cannot be successfully assailed.

The plaintiff seeks to enhance the rent of a tenure held by the defendant under him. The defendant pleads that his tenure has been in existence from the time of the Permanent Settlement, and its rent is consequently not liable to enhancement as neither of the contingencies mentioned in clauses (a) and (b) of section 6 of the Bengal Tenancy Act has admittedly happened. The question for decision accordingly is, whether this tenure has been held from the time of the Permanent Settlement.

Now it is not disputed that in 1793 a tenure bearing a rent of Rs. 105-15-1 was held under the then proprietors and included the land now in controversy. On the 25th November 1793, that is, shortly after the Permanent Settlement had come into force, on the 22nd March 1793, the land in suit was sold by the then tenure-holder to the predecessor in interest of the defendant, on the allegation that the rent proportionately payable in respect of the land conveyed was Rs. 19-13 as. 17 gds. 1 kara. The purchaser, thereupon, went to the proprietor and in order to secure recognition as a separate tenure-holder obtained from him, a *sanad* which recited the conveyance

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and entitled him to continue in occupation on payment of the amount of rent mentioned from generation to generation. The contention of the landlord is that this *sanad* created a new tenure, while the contention of the tenant is that there was no breach in the continuity of the pre-existing tenure. In my opinion, it is perfectly clear that the contention of the respondent is well-founded on principle. There is no dispute that the tenure was transferable. The purchaser, consequently, under the deed of sale acquired the interest of a tenureholder in the land conveyed to him. The only object why a *sanad* was obtained was to enable him to pay rent separately in respect of the land purchased by him, in other words, to separate his liability for rent from the liability of the holder of the remainder of the tenure. Now, it is well settled that the continuity of a transferable tenure is not affected by subdivision or by consolidation: *James Hills v. Huro Lall Sein* (1) and *Kasee Khoda Newaz v. Nubo Kishore Raj* (2). The decision in *Uday Chandra Kaji v. Nripendra Narayan Bhup* (3) which is apparently an authority in support of the contrary view, overlooks, as I had occasion to point out in *Adit Singh v. Sukhraj Rai* (4) the pre-existing law on the subject in this Court. Besides, as it turned upon the construction of clause (3) of section 50 of the Bengal Tenancy Act, it has no bearing upon the case before us.

In the view I take of the effect of the purchase of the tenure by the predecessor in interest of the defendant and of the *sanad* granted to him by the then proprietor, it is clear that the tenure must be deemed in law to have existed from before the Permanent Settlement. The plaintiff is consequently not competent to enhance the rent of the tenure under section 6 of the Bengal Tenancy Act.

A. T. M.

Appeal dismissed.

(1) (1865) 3 W. R. Act X. Rul. 135. (2) (1866) 5 W. R. Act X. Rul. 53.

(3) (1909) I. L. R. 36 Calc. 287 ; 13 C. W. N. 410.

(4) (1912) 17 C. L. J. 435.

PRIVY COUNCIL.

PRESENT : *Lord Shaw, Lord Sumner, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.*

SRI RAJA MALRAJU LAKSHMI VENKAYYAMMA -
RAO BAHADUR

v.

SRI RAJA VENKATA NARASIMHA APPA RAO BAHADUR
AND ANOTHER.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Contract—Proposal with a condition—Acceptance—Compliance with condition—Contract to bequeath a village—Specific performance—Practice—Special Leave to Cross-Appeal.

Upon the marriage of the appellant in 1886, her great aunt, a childless Hindu widow, who had brought up the appellant from an early age and was anxious that though married the appellant should continue to live with her, agreed that if the appellant and her husband would reside with her she would (*inter alia*) make provision for the appellant by the purchase of unspecified immovable property for her. The appellant and her husband accordingly resided with the great aunt. In 1893 the great aunt bought a village in her own name, but, as she declared, for the appellant. As the title of the village was not taken in the appellant's name, her husband became dissatisfied and ceased to reside with the great aunt, who in October 1893 wrote to the appellant to the effect that the village had been purchased for her and would be transferred to her on the writer's death. The appellant and her husband thereafter resided with the great aunt until the great aunt's death in 1909 :

Held, that the letter of October 1893 was a proposal with a condition which was accepted and there was thus a complete and binding contract in October 1893, and that there was compliance with the condition and the appellant was entitled to recover possession of the village.

In an appeal to the Judicial Committee by the plaintiff in a suit against three defendants upon a ground of action common to all three, a defendant who had not appealed from the decree of the Court of first instance, but had been made a respondent to an appeal by another defendant, and who was out of time for appealing to the Judicial Committee, was joined as a respondent and granted special leave to cross-appeal.

Two consolidated appeals from a decree of the High Court at Madras (November 26, 1909), varying a decree of the same Court (November 16, 1908), affirming a decree of the Court of the District Judge, Godaveri, (November 3, 1904).

The appellant brought the suit in 1902 against Rangayya Appa Rao (the first defendant), Narasimha Appa Rao (the second defendant) and Parthasarathi (the third defendant) for recovery of possession of a village called Repudi. It had belonged to her great

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aunt Rani Papamma Rao, upon whose death in 1899 the three defendants, after some litigation in which a receiver was appointed, were declared to be equally entitled. The receiver was also joined as a defendant to the suit. The appellant alleged that she was entitled to the village upon the death of her great aunt, either under a contract made by the latter or by reason of an oral bequest by her.

On November 3, 1904, the District Judge decreed the suit. He held that the village had been purchased under the alleged contract, and that the great aunt had subsequently agreed to hold it in trust for the appellant, subject to its remaining in the great aunt's possession until her death. He also held that the great aunt on the day of her death made an oral devise of the village to the appellant. Against this decree the second defendant alone appealed to the High Court. The other defendants, though they were joined as respondents in the appeal, took no part in the proceedings. The appeal was valued at a third of the valuation of the village given in the plaint. This appeal was heard by Sankaran Nair and Abdur Rahim JJ., who came to the conclusion that there was no oral devise. They, however, differed as to whether there was a contract as alleged. On November 16, 1908, the appeal was accordingly dismissed under section 572 of the Code of Civil Procedure, 1882.

The second defendant further appealed to the High Court under section 15 of the Letters Patent (Madras) joining the other defendants as respondents, and again valuing the appeal at one third of the value of the village given in the plaint. This appeal was heard by the Chief Justice (Sir Charles Arnold White) and Wallis and Miller JJ., who came to the conclusion that the evidence did not establish either a contract or devise. At the hearing of this appeal the third defendant (the appellant in the second of the present appeals) was represented by Counsel, who applied that the third defendant also should have the benefit of the decisions of the Court, but this application was rejected on the following ground:—

“The second Respondent who has not appealed asks the Court to set aside the decree against him also, but the old section 544 of the Civil Procedure Code, 1882 does not apply to the case, as the present appeal is not against the whole decree. Before the present Code came into force, the plaintiff had become entitled to hold her decree against the defendant undisturbed, and the provisions of the present Code cannot be applied retrospectively so as to deprive her of it: *Colonial Sugar Refining Co. v. Irving* (1).

In the result a decree was made on November 26, 1909, by which it was ordered that the decrees of 1908 and 1904 be reversed in so far as they related to the one-third share of the second defendant, and that "the plaintiff's suit as against the second defendant be dismissed."

Against the last mentioned decree the plaintiff preferred the first of the present appeals, her appeal being admitted by the High Court on May 8, 1910 and the second defendant being the only respondent.

On May 19, 1914, the third defendant, without first applying to the High Court, lodged a petition to his Majesty in Council praying that he should be added as a respondent to the plaintiff's appeal and should have special leave to cross-appeal. By an order in Council it was ordered *inter alia* (1) that the third defendant should be joined as a respondent to the plaintiff's appeal, (2) that he should have special leave to cross-appeal, and (3) that such leave should be subject to all objections which might be taken at the hearing of the appeal. The appeal and the cross-appeal were ordered to be consolidated and heard together.

The plaintiff-appellant took preliminary objections to the appearance of Raja Parthasarathi, the third defendant, which was heard by Lord Shaw, Sir John Edge and Mr. Ameer Ali.

*Sir H. Erle Richards, K. C.*, and *Kenworthy Brown*, for the plaintiff-appellant: The third defendant, has no *locus standi* in the plaintiff's appeal and should not have special leave to appeal against her. He did not appeal from the decree of the District Court and his right to appeal from that decree has been barred since February, 1905: Indian Limitation Act, 1877, Sch. 2, Art. 156. He did not appear on the hearing of the first appeal to High Court. He has not appealed from the first decree of the High Court, nor applied to the High Court for leave to appeal to His Majesty in Council against the decree of November 26, 1909. His right to appeal to the Privy Council is barred under the Indian Limitation Act, 1908, Sch. 1, Art. 179. He did not apply for special leave to appeal "with the least possible delay," as required by rule 5 of the Consolidated rules of the Judicial Committee, 1908. He ought to have applied to the High Court for leave under O. 45, r. 2 of the Code of Civil Procedure, 1908, and it is not the practice of the Board, except in very exceptional circumstances, to grant special leave to appeal unless the petitioner has first applied to the Court below: *Mutasawmy Jagavera v. Venkataswara* (1) and *Moti Chand*

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v. *Ganga Parshad* (1). The valuation of the appeals to the High Court show that they were not against the whole decree within section 544 of the Code of Civil Procedure, 1882. The third defendant was not therefore entitled to any relief under that section. O. 41, r. 33 of the Code of 1908, which was in force at the date of the Letters Patent appeal, did not apply because the plaintiff had then obtained a vested interest in the decree appealed from as against the third defendant: *Colonial Sugar Refining Co. v. Irving* (2) and *Karsandas Dharamsey v. Bai Gungabai* (3). In any case that rule is discretionary and the High Court has rightly exercised its discretion in refusing to give him relief. The only object of the third defendant to now come in as a respondent in the plaintiff's appeal is to enable him to avail himself of a decision adverse to her, and consequently the argument against his right to cross-appeal applies equally to his joinder as a respondent. Reference was also made to the Code of Civil Procedure, 1882, Secs. 598 and 599; and the Code of 1908, O. 41, r. 4.

*P. O. Lawrence, K.C.*, and *J. M. Parikh*, for the third defendant: The order in Council joined the third defendant as a respondent unconditionally, and only the special leave to cross-appeal is open to objection at the hearing. The decree of the District Court proceeded on grounds common to all the defendants. The appeals to the High Court were against the whole decree and the Court had power to give relief to the third defendant under section 544 of the Code of Civil Procedure, 1882: *Ram Kamal Shah v. Ahmad Ali* (4) and *Dhuttaloor Subbayya v. Paidigantam Subbayya* (5). The valuation of the appeal is for the purposes of Court fees and the question whether there is an appeal against the whole decree depends upon the grounds stated in the memorandum of appeal and upon the amount of Court fees paid thereon: *Cheda Lal v. Badullah* (6) Rules 4 and 33 of O. 41 of the Code of 1908 apply, but it is not necessary to rely on them. Where, as in this case, a decree proceeds on a ground common to all the defendants and there is an effective appeal against it by one of them, the Limitation Act does not bar the other defendants' rights. The case of *Colonial Sugar Refining Co. v. Irving* (2) has no bearing. Lastly, this is a petition for special leave to cross-appeal. It is not an application for special leave to bring a substantive appeal, and consequently the rule of

(1) (1901) L. R. 29 I. A. 40; I. L. R. 24 All. 174.

(2) (1905) App. Cas. 369.

(3) (1905) I. L. R. 30 Bom. 329.

(4) (1903) I. L. R. 30 Calc. 429 (472).

(5) (1907) I. L. R. 30 Mad. 470. (472).

(6) (1888) I. L. R. 11 All. 35 (38).

practice laid down in *Mutasawmy Jagavera v. Venkataswara* (1) and *Moti Chand v. Ganga Parshad* (2) does not apply. In a fitting case, and it is submitted that the present is such a case, the Board has given special leave to appeal *nunc pro tunc*, and in one case has given relief to the respondent even without requiring him to enter a cross-appeal: *Gajadhur Pershad v. Widows of Emam Ali Beg* (3), and *Cassim Ahmed Jewa v. Narainam Chetty* (4). Reference was also made to sections 112 and 154 of the Code of Civil Procedure, 1908.

*Sir H. Erle Richards, K.C.*, replied.

Their Lordships' order was passed by

**Lord Shaw:** Their Lordships are of opinion that the third defendant, being a party to the appeal, should have leave to present his cross-appeal. The question whether he is entitled to any relief will be further considered should the principal appeal fail.

The appeal was then heard on the merits by Lord Shaw, Lord Sumner, Sir John Ede, Mr. Ameer Ali and Sir Lawrence Jenkins.

*Sir H. Erle Richards K.C.*, and *Kenworthy Brown*, for the plaintiff-appellant: The evidence, verbal as well as documentary, establishes a contract by the great aunt which the Court can enforce by specific performance: *Hammersley v. De Biel* (5), which was decided on contract and not on the now exploded doctrine of making good a representation: see Pollock on Contracts, 8th Ed., p. 752, and the case cited there. The principle of *Synge v. Synge* (6) lately approved by the Board in *Central Trust v. Snider* (7) applies. There was a conditional proposal by the great aunt within the terms of section 8 of the Indian Contract Act (IX. of 1872), and acceptance by performance of the condition.

Reference was also made to *Maunsell v. Hedges* (8); *Maddison v. Alderson* (9), which was recently considered in *Mahomed Musa v. Aghore Kumar Ganguli* (10); and the Indian Contract Act, 1872, section 2 (d).

*De Gruyther K.C.*, and *Dube*, for the first respondent; and *P. O. Lawrence, K.C.*, and *J. M. Parikh*, for the second respondent and the cross-appellant: The evidence did not establish a contract but amounted merely to an expression of intention, which could not be enforced: *Maddison v. Alderson* (9); *Loffus v. Maw* (11); *Maunsell v. Hedges* (8), and *Jordan v. Money* (12) and

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(1) (1865) 10 M. I. A. 313.

(2) (1901) L. R. 29 I. A. 40; 1 L. R. 24 All. 174.

(3) (1875) L. R. 2 I. A. 205; 15 B. L. R. 221.

(4) (1910) L. R. 37 I. A. 133; 12 C. L. J. 231.

(5) (1845) 12 Cl. and F. 45.

(6) L. R. (1894) 1 Q. B. 466.

(7) L. R. (1916) A. C. 266.

(8) (1854) 4 H. L. C. 1039.

(9) (1883) L. R. 8 App. Cas. 467.

(10) (1914) L. R. 42 I. A. 1; 21 C. L. J. 231.

(11) (1862) 3 Giff. 592.

(12) (1855) 5 H. L. C. 217.



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Pollock on Contract, 8th Ed., p. 588 and the cases there cited. If the letter of October 1893, passed any title, it is inadmissible in evidence for want of registration: Indian Registration Act (III of 1877), Section 17 (b) and *Umrao Singh v. Lachhman Singh* (1).

At the time of the purchase of the village the great aunt did not constitute herself a trustee for the plaintiff. There was no declaration of trust then or subsequently. Reference was made to the Indian Trusts Act (II of 1882), sections 5 and 92. As regards the position of the cross-appellant, if the plaintiff's appeal fails, her suit should be dismissed as against all the defendants.

*Sir H. Erle Richards, K.C.*, replied.

*J. M. Parikh* replied on the cross-appeal.

The judgment of their Lordships was delivered by

May, 15.

**Lord Shaw**—These are consolidated appeals against a judgment and decree, dated the 26th November, 1909, pronounced by the Chief Justice and two Judges of the High Court of Judicature at Madras in an appeal under Letters Patent against a decree of the High Court, dated the 16th November, 1908. The two Judges constituting the High Court differed in opinion, with the result that a decree pronounced by the District Judge of Godaveri, dated the 3rd November, 1904, had been affirmed in the original appeal. The Letters Patent appeal was allowed and the suit was dismissed. The form which the dismissal took will be afterwards referred to.

The suit was brought with the main object described in the first prayer of the plaint,—to the effect that it be declared that the plaintiff is entitled to the village of Repudi, and that defendants do put the plaintiff in possession of the same.

Rajah Narayya, who died in 1864, was the owner of an extensive zemindary of Nidadavole. He was survived by two widows, both of whom were childless. One of these widows died in 1881; the other, a lady named Papamma, became sole life owner and continued to enjoy the estate until December 1899, when she died.

She resided in her palace, or fort, at Senivarpet, having a large income amounting to about 6 lakhs of rupees per annum. The appellant, who is plaintiff in the suit, was a grand niece of Papamma, and was brought up by her from an early age. In 1886, at the age of 14, she was married to the ex-zemindar of Narasaropet. He was a man of good standing, in the enjoyment of a small pension from the Government, and himself the owner of property of considerable value.

There can be little doubt that the Rani, herself childless, was on terms of attachment and affection towards the plaintiff and valued her companionship. When the marriage was arranged, the Rani disbursed all the suitable expenses thereof; but she appears to have been extremely anxious that her grandniece, although married, should continue to live with her. This, however, would without doubt have involved a certain loss of dignity and position on the part of her husband: and it appears clear from the facts proved that the obtaining of his consent to any arrangement of the kind was obtained with difficulty. The Rani agreed to make presents of jewellery to her grandniece, and to make provision for her apparently on a fairly ample scale by the purchase of immovable property for her. Upon this footing an arrangement was made and matters were settled. The date of that settlement was 1886, namely, the year of the plaintiff's marriage.

The arrangement was indefinite; and the indefiniteness was the cause of considerable uneasiness. Following upon it, however, the plaintiff and her husband did reside with the Rani until 1893. During this interval of time two properties were purchased by the Rani. The form in which she carried out her promise towards her grandniece was that in each instance she took the property in the first place in her own name, and after a period of about two years she granted a conveyance thereof to her grandniece. These properties were small. The balance of evidence is that they would not have been held by any of the parties as sufficient consideration for the plaintiff and her husband continuing to reside as stated. The Rani herself appeared, as circumstances afterwards showed, to be anxious to make further and more substantial provision for her grandniece. This was the situation of affairs up till the spring of the year 1893.

At the time the Rani purchased the property known as Repudi, She made no concealment of having done so for the plaintiff; but she did raise objection to the title of Repudi being taken directly in the plaintiff's name. The impression of her Dewan had been that the transaction was to be direct; and on the 28th February, 1893, a receipt was given to him for an advance paid in respect of the purchase which bore that "having settled to sell to you for 40,000 rupees the village"....."in order that you may give away the same to M. R. Ry. Rajah Malraju Lakshmi Venkayamma Rao Garu for dowry,"....."we have this day received from out of your own separate property 100 rupees as advance towards the said sale amount." This appeared to be much too direct for the Rani, and she wrote to the Dewan on the 8th March: "I have told you that

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this village should be purchased and the document obtained, for the present, in my name alone, as was done before." She mentioned her desire that the document "should be got written" as on the previous occasion, and she added "it is not my intention to have this village conveyed to anyone's name for the present, and so I have written this." In their Lordships' opinion the Rani desired to follow her own previous practice of taking the title in her own name, and as was done with the two other villages, thereafter to give a conveyance from herself. She uses the expressions "for the present," and "as was done for the former villages." The title was accordingly taken in her own name.

This, however, brought matters to a head with regard to the position of the plaintiff and her husband, and to their continuing to reside with the Rani. The plaintiff's husband left; he betook himself to his own property, and he received various communications which asked him to return, and contained assurances that the arrangement upon which Repudi was bought, namely, that it should be truly for the plaintiff, should be carried out. Their Lordships do not state these arrangements in detail. They are, however, fully satisfied on the evidence that the Dewan and the plaintiff's uncle were authorised to communicate to the plaintiff's husband this assurance and promise, and that in pursuance of that authority they visited him and made the communication.

The negotiations were protracted, but they culminated in a letter of date 12th October, 1893, written by Papamma in her own hand to the plaintiff herself, in which she stated: "Repudi was purchased for you alone. Some encumbrances thereon have yet to be discharged. I shall discharge the debt, retain it under me so long as I am alive, and afterwards convey it to you yourself. From that forwards you may do with it as you please. The whole world knows that I purchased it (only) to give it away to you. Do not think, even in your dream, that I, who brought you up from infancy, would ruin you. I wrote to the grandson (she designated the plaintiff's husband thus) in that manner, thinking that there was need to tell him all these matters and nothing else."

This letter appears to their Lordships to be a promise, and to be quite definite (1) with regard to its subject-matter, namely, the village of Repudi; (2) with regard to the ownership thereof, namely, that that was to be in the plaintiff; and (3) with regard to the date of her entry into possession thereof, namely, that possession would be given immediately upon the expiry of the life interest therein, which Papamma reserved to herself.

In their Lordships' opinion this promise was accepted. The evidence taken as a whole and the actings of parties are in entire conformity with this being so. Their Lordships believe the plaintiff's testimony to the following effect: "In the said letter she wrote to say that she would pay off the debts, keep the village under her throughout her lifetime and then give it to me. I agreed to it. I informed my husband of this. He too consented to it. Being unable to bear the separation, she desired me to stay with her. She promised to give me, as aforesaid, for staying with her accordingly till her death. The arrangement was that both myself and my husband should remain there. I consented to it accordingly. My husband also consented to it. Had Papamma Rao Garu failed to enter into such an agreement in regard to Repudi, myself and my husband would not have stayed there."

The Board is of the opinion accordingly that there was here a completed contract. Papamma accomplished her desire, and she obtained the consideration which she had so much at heart. Acceptance of her terms and compliance with her stipulation were made. The words of Lord St. Leonards in *Maunsell v. Hedges* (1) might be asked here: "Was it not a proposal, with a condition, which, being accepted, was equivalent to a contract?" Their Lordships do not doubt that it was.

From that date forward, for a period of about seven years, namely, until Papamma's death in 1899, the plaintiff and her husband continued to live with her in her palace. There is a mass of oral and documentary evidence, but it does not advance, nor does it in their Lordships' opinion recede from, the point of completed contract as above set forth.

This being so, the citation of that set of cases of which *Maddison v. Alderson* (2) and *Maunsell v. Hedges* (1) are the familiar examples is beside the mark. In both of these cases, as must be done in all cases of a similar character, the true issue must be disentangled from statements or representations *simpliciter*, or from mere announcements of intention; and that true issue is: is a contract proved? Had a contract been proved in either of the examples cited, there is nothing to suggest that the law would have refused to give effect to it by way of specific performance.

*Maddison v. Alderson* (2) is a good instance of the point. The contract was alleged to be constituted by a promise followed by actings on the faith thereof. The actings were carefully scrutinised

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(1) (1854) 4 H. L. C. 1039

(2) (1883) L. R. 8 App. Cas. 467.

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in order to see whether the contract, the sole evidence of which otherwise was in the testimony of the plaintiff herself, was established. Lord O'Hagan put the matter thus: "Assuming that the action be considered maintainable, if at all, for the purpose of forming a parole contract partly performed, the course of the argument appears to me to have been further erroneous in this, that instead of seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, it reversed the order of the contention. The Court was asked from the findings of the jury and the testimony supporting them to say there was a contract, and then to discover in the conduct of the parties acts of performance sufficient to validate the bargain so previously ascertained." And Lord Blackburn put the matter broadly thus: "It seems to me that in this case the evidence is evidence from which a contract would not have been found by a jury if it had been explained to them that to make a contract there must be a bargain between two parties."

In the case of *Maunsell v. Hedges* (1) a bill was filed for the purpose of compelling those claiming under a certain will to settle certain real estates in Tipperary on the appellant pursuant to an alleged obligation arising out of certain letters. The letters disclosed that the deceased had positively declined to be bound. "I shall never settle," said he, "any part of my property out of my power so long as I exist." It was held that there was no contract placing the testator under such obligation.

In short, to use the language of Lord Cranworth in *Jordan v. Money* (2), (a case in which the process of disentangling the true from the erroneous issues, as above alluded to, was carefully followed), "The question upon this part of the case is simply one of fact. Is it made out by such evidence as can justify a court of justice in acting upon it that such a contract as that which is alleged really was entered into?" The Board is of opinion in the present case that this question should be affirmatively answered.

It was strongly pressed upon their Lordships that the letter did not contain sufficient evidence of anything but an intention, and that it stopped short of any actual promise upon which acceptance of it as such might follow. Their Lordships do not think so. The law of India does not require writing at all in regard to such a

(1) (1854) 4 H. L. C. 1039.

(2) (1855) 5 H. L. C. 217.

bargain; but their Lordships are not surprised, looking to the frequent challenges made of contracts resting upon word of mouth alone, that the desire should have been expressed to have Papamma's undertaking in writing and distinctly set down. In their Lordships' opinion they were so obtained, and a contract was concluded in October 1893.

Another view of the case would lead precisely to the same result. It is this: Suppose the proof of the acceptance made by the Rani, that is to say, of an acceptance in terms, were considered to be defective, what is the situation of the parties in view of the actings of the plaintiff and her husband? Their Lordships are of opinion, looking to the demand for a definite proposal as a condition of the plaintiff and her husband staying on with the Rani, that their actings did take place upon the footing of the proposal so made and that they were known by Papamma to have taken and to be taking place on that footing. In these circumstances the objection that the contract itself was inchoate or incomplete cannot be maintained. The law in this sense was fully explained by Lord Selborne in the case of *Maddison v. Alderson* (1), a judgment which was cited at some length by this Board in *Mahomed Musa v. Aghore Kumar Ganguli* (2). After such actings *locus penitentie*, or the power of resiling from an incomplete engagement or an unaccepted offer is, to use language borrowed from the law of Scotland and highly approved in the case referred to, barred by "*rei interventus*, which raises a personal exception which excludes the plea of *locus penitentie*." As was stated in the judgment of the Board in *Mahomed Musa's case* (2), "Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but upon the contrary, that these laws follow the same rule."

As stated, accordingly, the same result is reached. And it would not be open for those representing the Rani or her estate to resile from or fail to perform the obligation or deliver possession of the village of Repudi to the plaintiff, such possession to take effect as from the date of the Rani's death.

The question of Papamma's intention is, of course, of fundamental importance, and it was much pressed upon the Board that she never meant to be bound. Their Lordships do not agree. They do not think that Papamma meant to avoid a bargain, or ever meant to have her grandniece and husband live on with her under the impression, on their part, that they were bound, whereas all the time she, Papamma, knew she was, and intended to be, free.

(1) (1883) L.R., 8 App.-Cas 467. (2) (1914) L. R. 42 I. A., 1; 21 C. L. J. 231.

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Their Lordships do not think that the Rani's design included duplicity of this character.

The transactions of October 1893, followed by the years of compliance, on the footing that those transactions formed a concluded contract, leave no substantial doubt that no repudiation by the Rani would have affected it. Fortunately, however, there is a body of evidence throwing light upon the Rani's own view.

Her death occurred on the 5th December, 1899. On her death-bed she declared that she had purchased Repudi village solely on account of the plaintiff. Their Lordships believe the plaintiff's statement that the Rani then said "that she had purchased the Repudi village on my account alone, that I should take it after her death." The Dewan's evidence is quite plain upon the subject. He made a statement on the 5th December before the Tahsildar as to his instructions by the Rani, in which he said "she has given me directions saying, among other things, that the village of Repudi had been given away to her granddaughter, and that the same should be delivered into possession of her after her death."

In the opinion of the Board accordingly, instead of there being any such repudiation of the contract, there was a dying declaration by the Rani, which, in their Lordships' opinion, constituted a reaffirmation and confirmation thereof.

Their Lordships observe that much discussion and considerable difference of judicial opinion arose, in the courts below, upon the question whether these statements made on death-bed by the Rani did not constitute a nuncupative will. Such a will is valid in India. Some of the Judges, including the trial Judge, thought that it did; others thought it did not. The argument presented at this Board is noticeable in this particular: It was to the following effect: "Granted that the words taken by themselves might have made a will, it really could not have been so because the lady used language, the true effect of which was a declaration that the property of Repudi was already the plaintiffs'. She thought that it was, and therefore did not make a will with regard to it." If this argument be sound, that there was no will for the reason given, then the reason given is very helpful evidence that the Rani had already and effectually given a right to Repudi to the plaintiff, under which, immediately she, the Rani, died, the plaintiff would enter into possession of the village.

As stated, their Lordships are of opinion that the plaintiff has such a right in terms of a contract accepted and complete, and that a will accordingly would not have been in place in the circumstances,

and should not be affirmed by law. Upon the other hand, the declaration on death-bed by the Rani herself leaves no doubt that what had been done had been effectively done. Her belief and statement to that effect were entirely well-founded.

With regard to the shape of their Lordships' decree, it is to be noted that, consequent upon litigation with regard to this and other property, a receiver was appointed. This circumstance saves any complexity from arising in the carrying out of the present judgment. The receiver will act upon it. He will deliver possession of Repudi upon the terms of the contract now affirmed, that is to say, the plaintiff will be entitled to the village as from and after the Rani's death.

The judgment now given disposes of any necessity for a pronouncement upon the cross-appeal.

Their Lordships will humbly advise His Majesty that the appeal be allowed with costs, and that the cross-appeal be dismissed also with costs.

*Douglas Grant*—Solicitor for the Plaintiff-appellant.

*T. L. Wilson & Co.*—Solicitors for the first Respondent.

*Edward Dalgado*—Solicitor for the second Respondent and Cross-appellant.

J. M. P.

*Appeal allowed and cross-appeal dismissed.*

PRESENT :—*Lord Atkinson, Lord Parker of Waddington,  
Sir John Edge and Mr. Ameer Ali.*

CHANDRIKA BAKHSI SINGH

*v.*

RAJA INDAR BIKRAM SINGH.

[ ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER  
OF OUDH. ]

*Suit for a declaration of title to immovable property by a person in possession—  
Finding against Defendant's plea of adverse title—Decree declaring title—  
Appeal by Defendant who does not challenge the finding against him—His  
right to maintain appeal.*

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In a suit for a declaration of title to immovable property by a plaintiff in possession, by virtue of a deed of gift executed by a Hindu widow with the consent of the reversioners, the Court of first instance found against the title set up by the defendant on the strength of a will executed by the husband of the Hindu widow, held also that the will set up was never executed and the deed of gift was genuine and decreed the suit. The defendant then appealed but at the hearing of the appeal he only contested the genuineness of the deed of gift but he did not dispute the correctness of the finding of the lower Court as to the alleged will.

*Held*, that the suit being not for the ejectment of a defendant who was in possession, but only for declaration of title by a plaintiff who was in possession, it was not for the plaintiff to prove a better title in himself to the possession of the property than the title of the defendant.

*Held also*, that the defendant not having contested the decision of the first Court as to the genuineness of the will set up by him before the Appellate Court and the first Court having found that the defendant had no title, the plaintiff appellant was to succeed and the defendant had no right to contest the declaration in favour of the plaintiff.

Appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh (May 25, 1911), reversing a judgment and decree of the Court of the Subordinate Judge of Barabanki (January 3, 1910).

Pirthipal Singh died possessed of a certain talook. On the death of his son and son's wife the talook devolved for a Hindu widow's estate on his widow Babuain Maharaj Rani, who purported by a deed of gift to transfer the talook to the appellant. Appellant was a reversioner, but there were two nearer reversioners Mahabir Singh and Bechu Singh, who relinquished their rights in appellant's favour. Possession was delivered to appellant who thereupon applied for mutation of names to the Revenue authorities, but the respondent opposed and set up a will of Pirthipal Singh by which the talook was devised to him after Maharaj Rani's death. Thereupon the plaintiff brought this suit for a declaration of title. Respondent denied Maharaj Rani's power of transfer, pleaded his own title under the will, and also set up a prior title in two other reversioners. The trial Court found all issues against the respondent and decreed the suit. Respondent appealed. At the hearing of the appeal respondent abandoned his pleas of adverse title in himself and others but still contested the suit on the ground that the Rani had exceeded her powers of disposition and though plaintiff contended the respondent had no right to be heard in support of his appeal this contention was overruled, the appeal allowed, and the suit dismissed. Hence this appeal.

*De Gruyther, K. C.* (with him *G. C. O'Gorman*) for the Appellant :  
On his own admissions the respondent had no title whatever to the estate, and this being so, whatever the merits might be, he had no *locus standi* to maintain the appeal. He referred to *Narindar Bahadur Singh v. Achal Ram* (1), and *Raja Modhu Sudan Singh v. Rooke* (2).

*Dunne*, (with him *Dube*) for the Respondent, submitted that plaintiff-appellant who was in possession, had no cause of action against respondent. In any case the present appeal to the Board was superfluous.

**Lord Atkinson** :—Their Lordships will humbly advise His Majesty to allow this appeal and give reasons for the report in due course.

The reasons for their Lordships' report were delivered by

**Sir John Edge** :—This is an appeal from a decree, dated the 25th May, 1911, of the Court of the Judicial Commissioner of Oudh, which reversed a decree dated the 3rd January, 1910, of the Subordinate Judge of Barabanki and dismissed the suit with costs.

The facts necessary for the decision of this appeal may be briefly stated. The dispute relates to the appellant's title to an Oudh taluka, known as Mahgawan, which was an impartible estate. The parties are Hindus, subject to the law of the Mitakshara. On the 13th December, 1904, Babuain Maharaj Rani, who held Mahgawan for a Hindu widow's interest, made, by a deed of gift, an absolute transfer of Mahgawan to the appellant, and he obtained possession. To that transfer Mahabir Singh and his younger brother, Bechu Singh, were consenting parties. At the time of the transfer Mahabir Singh was the heir to Mahgawan expectant on the death of Babuain Maharaj Rani, and the appellant is his only son. Upon the transfer to him the appellant applied to the Revenue authorities for mutation of names in his favour. On the 9th January, 1905, the respondent, who was not a member of the family which had held Mahgawan, filed objections to mutation of names being made in the appellant's favour, alleging that Babuain Maharaj Rani had no power to transfer the estate, and claiming title to it in himself under an alleged will of 1866 of Babu Pirthipal Singh, who had been the husband of Babuain Maharaj Rani. In consequence of the respondent's objections, the Revenue authorities on appeal rejected the appellant's application for mutation of names, and the appellant, in order to clear his title and obtain mutation of names, was compelled to bring this suit. He brought this suit on the 11th December, 1908, in the Court of the Subordinate Judge of Barabanki for a declaration of his title as proprietor of Mahgawan.

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(1) (1893) L. R. 20 I. A. 77 ; I. L. R. 20 Calc. 649.

(2) (1897) L. R. 24 I. A. 164 ; I. L. R. 25 Calc. 1.

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To the suit the respondent, and Babuain Maharaj Rani, Mahabir Singh, and Bechu Singh were made defendants. By their written statements Babuain Maharaj Rani, Mahabir Singh, and Bechu Singh admitted the appellant's title, and Mahabir Singh and Bechu Singh expressly alleged that it was with their consent that Babuain Maharaj Rani had executed the deed of gift of the 13th December, 1904, and that they had on the 9th November, 1908, executed deeds of relinquishment in favour of the appellant, who was in proprietary possession of the taluka.

The respondent in his written statement denied the appellant's title, did not admit that Babuain Maharaj Rani had executed the deed of gift of 1904; denied that she had any power to transfer the estate to the appellant; did not admit that the appellant was in proprietary possession; alleged that Mahabir Singh and Bechu Singh were not legitimate; alleged that the nearest reversioners were persons whom he described as Girdhara Singh and Kalka Singh; and asserted title in himself through the alleged will of 1866 of Babu Pirthipal Singh.

The Subordinate Judge of Barabanki found that Babuain Maharaj Rani had executed the deed of gift of 1904 in favour of the appellant with the consent of Mahabir Singh and Bechu Singh, who were, he found, legitimate; that the taluka passed under that deed of gift to the appellant; that the appellant was then and had been since the date of the deed of gift in proprietary possession of the taluka; that Girdhara Singh and Kalka Singh were fictitious persons; and that Babu Pirthipal Singh had not made the alleged will of 1866; and gave to the appellant a declaration that he was the absolute proprietor of the properties detailed in Schedules A, B and C to the plaint, and would continue to be such proprietor after the death of Babuain Maharaj Rani.

From that decree the respondent on the 31st March, 1910, appealed to the Court of the Judicial Commissioner of Oudh, making the appellant and Babuain Maharaj Rani respondents to his appeal. In June 1910 Babuain Maharaj Rani died. On the 9th February, 1911, Mahabir Singh and Bechu Singh respectively filed petitions and affidavits in the appeal in the Court of the Judicial Commissioner, in which they asserted that the deed of gift of the 13th December, 1904, had been executed by Babuain Maharaj Rani by their advice and with their consent; that the deed was valid, and that Babu Chandrika Bakhsh Singh had been put in proprietary possession of the taluka at the time of the execution of the deed, and they prayed to be added as respondents to the appeal. On the 24th March,

1911, Mahabir Singh and Bechu Singh were by order of the Court of the Judicial Commissioner added as respondents to that appeal.

When the appeal came on for hearing in the Court of the Judicial Commissioner, Raja Indar Bikram Singh, through his Counsel, informed the Court that he did not contest the decision of the Subordinate Judge as to the alleged will of 1866, or as to the non-existence of the alleged reversioners Girdhara Singh and Kalka Singh, or as to the execution of the deed of gift of the 13th December, 1904, and his counsel confined his contention in opposition to the decree of the Subordinate Judge to an argument that the deed of gift did not represent any genuine transaction, and that Babu Maharaj Rani had remained in possession, and had no power to confer any valid title upon Babu Chandrika Bakhsh Singh.

The suit was not a suit for the ejectment of a defendant who was in possession, in which the plaintiff would have to prove a better title in himself to the possession of the property than the title of the defendant. On the contrary, it is a suit for a declaration of title by a plaintiff who was and is in possession. The Subordinate Judge had found that Raja Indar Bikram Singh had no title, and when the correctness of that finding was not disputed in the Court of the Judicial Commissioner of Oudh, it should have been apparent to the Judges of that Court, who were hearing the appeal, that as Raja Indar Bikram Singh had failed to prove that he was, even remotely concerned in the title to Mahgawan and in the right to the proprietary possession of that taluka, he had no title to protect and no interest which could give him a right to contest the declaration of title which Babu Chandrika Bakhsh Singh had obtained, and that the appeal to that Court should be dismissed. Raja Indar Bikram Singh was a mere impertinent intervener in another person's affair. The Judges who heard the appeal, however, instead of dismissing it, went into a long and, under the circumstances, a purely academic discussion as to the powers of a Hindu widow to dispose of property and finally allowed the appeal and dismissed the suit with costs.

Their Lordships, at the conclusion of the argument, humbly advised His Majesty that this appeal should be allowed; that the decree of the Court of the Judicial Commissioner of Oudh should be set aside with costs; and the decree of the Subordinate Judge of Barabanki restored.

The respondent was ordered to pay the costs of the appeal.

*T. L. Wilson & Co.*—Solicitors for the Appellant.

*Barrow, Rogers & Nevill.*—Solicitors for the Respondent.

J. M. P.

*Appeal allowed.*

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PRESENT :—*Lord Atkinson, Lord Parker of Waddington,  
Sir John Edge and Mr. Ameer Ali.*

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MAHARAJA SRI RAM CHANDRA BHANJ DEO

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL  
AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT  
WILLIAM IN BENGAL.]

*Permanent Settlement—Kabuliat—Construction—Zemindar's undertaking with respect to Sardars and Paiks—Paiks doing private and public duties—Land on service tenure—Land held by Paik having no connection with the police—Zemindar's right to resume such land—Chowkidari Chakran Land—Zemindar's right therein—Burden of proof that the lands in dispute are Chowkidari Chakran lands—High Court Practice—Second appeal—New issue in second appeal—Power to remand the case for trial of such an issue.*

Where in January 1801 the Zemindar of Pergunnah Nayabasan, which was settled with him in that year, executed a *Kabulyat* in favour of the Government under which he was bound to maintain and keep the same "Sardars and Paiks" who had all along existed in the pergunnah, and to carry out whatever order might be passed by the Magistrate on the Paiks :

*Held*, that the Sardars and Paiks referred to in the *Kabulyat* were Sardars and Paiks employed on police duty ; that the document had no reference to Paiks who held Jaghirs within the pergunnah on tenure services personal to the Zemindar himself and having no connection with the local police ; and that the Zemindar was entitled to determine the employment of a Paik who was in his personal service and held a Jaghir on service tenure determinable when his employment ceased, and to recover possession of his Jaghir.

Chowkidari Chakran lands are lands which at or before the Permanent Settlement had been appropriated or assigned for the maintenance of the police force and by reason of such appropriation excluded from the Zemindari assessment. The Zemindar is precluded by Bengal Regulations I of 1793 and XIII of 1805 from utilising Chowkidari Chakran lands for remunerating persons who are his personal servants and performed no police duties, but the onus of proving that the lands in dispute are so appropriated or assigned is on the Government.

*The Secretary of State for India in Council v. Kirtibas Bhupati Harichandan Mahapatra* (1), relied on.

Even if it be competent to the High Court in second appeal to remit a case for rehearing on an issue not raised in the pleading or even suggested in the Courts below, that ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away.

Appeal from an order of the Calcutta High Court, (Brett and Sharfuddin JJ.), dated 27th April 1910, setting aside in second appeal a decree of the District Judge of Midnapur (which confirmed a

decree of the Subordinate Judge of that place) and remanding the case for re-trial.

The Appellant is the Zemindar of pergunnah Nayabasan, and in his zemindari are certain lands held by persons in what is known as service or chakran tenure. A predecessor in title of the Appellant executed a Kabulyat in 1801 in accordance with Reg. I of 1793, which contained the following material clause :—

"I shall maintain and keep on the same Sardars and Paiks who have all along existed in the said pergunnah. I shall carry out whatever order may be passed by the Magistrate on the Paiks. I have no power to dismiss the Sardars and Paiks. I shall, year by year, file a list of the names of the individual Sardars and Paiks before the Magistrate and one such list before the Collector. I shall depute the Paiks to keep watch and take care of the boundaries of the said pergunnah and see that no theft and dacoity and any riot may take place anywhere. I shall carry out any order that may be passed by Government, as best as I can. I shall constantly be engaged for the good of the Government. I shall not neglect in any way to pay the Government revenue and to comply with the several provisions. If I do not pay the above Government revenue according to the instalments or if I act contrary to any order that may be passed at any time in respect of the Paiks and (torn) as mentioned above, then the Members of the Board and of the Council shall be competent to eject me forthwith from the zemindari of the said pergunnah and resume the zemindari of the said pergunnah and grant the zemindari of the said pergunnah to any body they like (torn)."

It was the appellant's case that there were and had been from time immemorial two classes of Paiks holding service lands within the zemindari. The first class consisted of Government Paiks called commonly Chowkidars, Digars, and Sirdars and the second class of private Paiks called commonly Dal Paiks, Dal Beharas and Bhullakes. The Appellant admitted that the provisions of the Kabulyat and also those of Regulation XX of 1817, section 21 applied to the first class and did not claim any power to dismiss them but he contended that the second class were his private servants and that it rested with him to dismiss them at his pleasure.

In 1898 appellant dismissed one Suba Naik whom he alleged to be a private Paik, and attempted to resume Suba Naik's jaghir land. Suba Naik obtained an order from the Magistrate the effect of which was to prevent his ejectment without suit. He died and was succeeded in possession by his sons. Appellant instituted this suit

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against the sons and the Secretary of State, claiming the land and a declaration of his right to dismiss the second class of Paiks without the interference or control of Government.

The sons pleaded that they were in fact private Paiks but that they had done nothing for which they could be dismissed. The Secretary of State contended that all Paiks on the estate came within the term of the *Kabuliyat* and that even if they were of two classes *Suba Naik* came within the first class.

It was found by the Subordinate Judge and on appeal by the District Judge that there was a class of private Paiks over whom the *Zemindar* had absolute control, and that *Suba Naik* belonged to that class. They decreed the suit.

The Secretary of State preferred a petition of second appeal to the High Court raising for the first time the contentions :—

(1) That the material issue was whether the lands in suit were at the settlement dealt with as ordinary lands of the estate or as *Jaghir* lands reserved for remunerating Paiks for services.

(2) That the only questions in the case were (a) whether *Suba Naik's Jaghir* existed at the settlement and (b) what kind of duties *Suba Naik* had to perform at the Settlement and that this issue and those questions had not been tried.

The High Court (Brett and Sharfuddin, JJ.) remanded the case for rehearing on the question whether *Suba Naik's* lands were included in those excepted from revenue because appropriated for the maintenance of the police and whether, if so, plaintiff could resume them or dismiss *Suba Naik* even if only employed in *Zemindari* duties. Costs to abide the result.

Hence this appeal.

*De Gruyther, K. C.* (with him *Raikes*) for the Appellant : 'The enquiry in the Courts below was confined to the questions (1) whether from the first there have been two classes of Paiks and (2) whether this particular Paik was a policeman or a private servant. I have two findings of fact in my favour, and no second appeal lay : Code of Civil Procedure, Act XIV of 1882, section 584, corresponding to section 100 of the Code of 1908. Attempts have been made from time to time to amplify the provisions of the Code, but have invariably failed: *Durga Chowdhurani v. Jewahir Singh Chowdhri* (1). The High Court's judgment practically is that the lands in suit are Government lands, and that whether or not the *Rajah* could dismiss *Suba Naik*, he could not put his own man on

Government land. No such contention was even raised in the lower Courts. Assignment of particular lands by a Zemindar is immaterial, there must be assignment by Government : *Secretary of State v. Kirtibas Bhupati* (1).

If these are Chaukidari Chakran lands, as suggested by the High Court, it must be shown (1) that at the time of the settlement in 1801 they were Government lands, and (2) that they were not assessed.

But these questions not having been raised till the case came before the High Court, I submit that it is not necessary to go into them.

*Sir Erle Richards K. C.*, (*Dunne* with him) for the respondents : The fourth issue covers the point : it was "Has the plaintiff any right to the land in suit? Is he entitled to possession?" I admit that the land was within the limit of plaintiff's zemindari, but it was not assessed. I am entitled to question the decision of the first Appellate Court, as it placed a wrong construction on the Kabuliyat. Some Paiks do both duties, public and private : *Joykishen Mookerjee v. Collector of East Burdwan* (2).

Cases of this class (where the service is public as well as private) depend on the question, what was the character of the land at the time of the decennial Settlement. I admit that this question was raised for the first time in the grounds of appeal to the High Court. The first two Courts have applied a wrong test, viz. by whom was the land occupied? If the declaration as to title stands, Government will be precluded from raising the question of its title again. I submit that the remand is a matter within the discretion of the High Court and that this Board will not interfere.

*Dunne* followed : The High Court treated this as a matter of construction. They say that the question whether Suba Naik was performing public duties is not exhaustive. If we had had evidence on the new issue, we should not have asked for a remand : we had to make an appeal *ad misericordiam*.

The true test is whether Suba Naik was one of the class whose duty it was to perform police duties.

No reply was called upon.

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(1) (1914) L. R. 42 I. A. 30 ; 21 C. L. J. 31.

(2) (1864) 10 M. I. A. 16.



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The judgment of their Lordships was delivered by

**Lord Parker of Waddington** :—This was an action in which the appellant, as plaintiff, sought to recover possession from the first and second defendants of a jaghir containing about 26 bighas of land situate within the territorial limits of the Pergunnah Naya-basan in the district of Midnapur, of which the appellant was the proprietor. The Secretary of State, who alone has appeared as a respondent in this appeal, and is hereafter referred to as the respondent, was added a third defendant because the Government of India disputed the right which the appellant was asserting in the action. The appellant's case was that in 1898 one Suba Naek was in his personal service and held the jaghir on service tenure determinable when his employment ceased; that he had duly determined the employment of Suba Naek and given him notice to quit his jaghir; that Suba Naek had refused to deliver up possession of the jaghir, and had obtained from the Magistrate an order which precluded the appellant from obtaining possession thereof without civil suit; that Suba Naek had since died, and that the first and second defendants wrongfully claimed to retain possession as his heirs.

The Pergunnah Nayabasan was settled in 1801 with Rani Sumitra Bhanj (the appellant's predecessor in title), who in January of that year executed a *kabulyat* in favour of the Government. Under this *kabulyat* the proprietor of the Pergunnah was bound to maintain and keep the same "Sardars and Paiks" who had all along existed in the Pergunnah, and to carry out whatever order might be passed by the Magistrate on the Paiks. He was also precluded from dismissing the Sardars or Paiks, and bound to depute the Paiks to watch and take care of the boundaries of the Pergunnah, and see that no theft or dacoity and no riot occurred anywhere.

The appellant has throughout contended that the Sardars and Paiks referred to in this *kabulyat* are Sardars and Paiks employed on police duty, and that the document has no reference to Paiks who hold on tenure services personal to himself, and having no connection with the local police. This contention has been upheld, and in their Lordships' opinion rightly upheld, by all the Courts below. On the other hand, it has been throughout contended by the respondent that the provisions of the *kabulyat* preclude the appellant not only from dismissing Paiks whose tenure services include the performance of police duties, but from resuming their jaghir lands, even though he might provide for their remuneration in some other way. The appellant having accepted this contention,

their Lordships will assume, as was assumed in all the Courts below, that it is correct.

On reference to the written statement of the respondent by way of defence to the action, it will be found that, so far as material for the purposes of the present appeal, he relied entirely on the provisions of the *kabulyat*. In order to succeed, he had, therefore, to prove that Suba Naek held by service tenure involving the performance of police duties. Curiously enough, the first two defendants put in a statement, by way of defence, repudiating this. Their case was that they were in possession by hereditary right on a service tenure which did not involve the performance of any police duty, but that the appellant had no right to dismiss them if they were ready and willing, as they in fact were, to perform their proper services. They subsequently applied for leave to withdraw this statement and substitute another. This application was refused, but they appear to have given evidence at the trial in support of the respondent's case.

The Subordinate Judge found first that there had always been two classes of Paiks within the Pergunnah : (1) Paiks who hold their jaghirs in consideration of the performance of police duties, and (2) Paiks whose tenure services were personal to the Zemindar. He also found that Suba Naek belonged to the latter class. On these findings of fact he held, and in their Lordships' opinion rightly held, that the defence of the respondent failed, and gave judgment in favour of the appellant.

The first and second defendants were content with this decision, but the respondent appealed to the District Judge, who came to the same conclusions both of fact and law as had been come to by the Subordinate Judge, and dismissed the appeal with costs.

The respondent thereupon presented an appeal to the High Court. By section 584 of the Civil Procedure Code then in force the High Court as second Court of Appeal was bound by the findings of fact of the District Judge. In their Lordships' opinion the High Court was not at liberty to disregard the finding that Suba Naek belonged to the class of Paiks having no police duties, on the ground that the District Judge gave no reasons for coming to this finding. The reasons of the District Judge are clear. He had considered the evidence and saw no reason for differing from the conclusions at which the Subordinate Judge had arrived. The High Court therefore could only allow the appeal on grounds of law, and as they agreed with the Court below on the construction of the *kabulyat*, it is not obvious what other questions of law arose. The respondent,

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however, urged upon the High Court that the Courts below had entirely misconceived the issue they had to try. This issue was, he contended, whether the lands comprised in the jaghir in question were Chowkidari Chakran lands, that is, lands which at or before the settlement had been appropriated or assigned for the maintenance of the police force, and by reason of such appropriation excluded from the Zemindari assessment. It is in their Lordships' opinion quite clear that no such issue was raised by the pleadings. Had this been the issue raised by the pleadings the question whether Suba Naek was a Paik with police duties would have been of little importance if not quite immaterial. The appellant would be precluded by Regulations I of 1793, and XIII of 1805 from utilising Chowkidari Chakran lands for remunerating persons who were his personal servants and performed no police duties, but as appears from the case of *The Secretary of State for India v. Kirtibas Bhupati Harichandan Mahapatra* (1), the onus of proving that the lands in question were so appropriated or assigned would lie on the respondent. The *kabulyat* contains no reference whatever to any such lands.

It was admitted before their Lordships that this contention was put forward for the first time before the High Court. Such admission could hardly be avoided. The real question upon the pleadings was whether the appellant could rightly terminate Suba Naek's tenancy. The new issue suggested raises the question not whether Suba Naek's tenancy could be determined, but whether it ought not to be determined and the jaghir utilised for maintaining some police officer appointed by the Government. Nevertheless, the High Court held that this was real issue, and, as it had not been tried, discharged the order of the District Judge and remitted the action for rehearing. It not only did this, but it ordered all the costs already incurred to abide the result of the rehearing. In other words, if the appellant failed on a new case set up for the first time on the second appeal, he would have to pay whole costs of the issues on which he had succeeded in the two Courts below.

In their Lordships' opinion, even if it be competent to the High Court to remit a case for rehearing on an issue not raised in the pleadings or even suggested in the Courts below, this ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away. In the present case the respondent showed no ground whatever for the indulgence he claimed. He did not suggest that he had been in any way taken by surprise or had

(1) (1914) L. R. 42 I. A. 30; 21 C. L. J. 31.

discovered fresh facts of which he was unaware when the case was before the lower Courts. The possibility of the lands in question being Chowkidari Chakran lands, which could not, according to the Regulations, be resumed, must have been present to the minds of his advisers when his statement by way of defence was filed. It had been suggested by the magistrate whose order necessitated the action. The action of the respondent's advisers in not raising the point must have been deliberate. With knowledge of it, he elected to fight the action on the question whether Suba Naek could rightfully be dispossessed of his jaghir rather than on the question whether he ought not to be dispossessed and the jaghir utilised for police purposes. The record contains little or no evidence pointing to there being any Chowkidari Chakran lands which could not be resumed within the Pergunnah. On the contrary, the *Rubokari* in Persian, the genuineness of which was accepted by the District Judge, points the other way. The respondent does not suggest that he has any further evidence.

Their Lordships are therefore of opinion that this appeal should be allowed with costs here and below, and that the order of the District Judge should be restored, and they will humbly advise His Majesty accordingly.

*T. L. Wilson & Co.*—Solicitors for the Appellant :

*The Solicitor, India Office.*—Solicitor for the Respondent :

J. M. P.

*Appeal allowed.*

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PRESENT :—*The Lord Chancellor (Lord Buckmaster), Lord Atkinson,  
and Sir John Edge.*

MUSAMMAT RADHA KUNWAR

v.

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[ ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE  
NORTH-WESTERN PROVINCES, ALLAHABAD ].

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*Mortgage suit—Person setting up an adverse claim to the mortgaged property—  
Misjoinder of Parties—Practice—Misjoinder of causes of action—Subject  
matter of appeal, method of valuation—Value of land mortgaged or value of  
mortgage—Appeal to Privy Council—Certificate of value by High Court not  
conclusive when proceeding upon a wrong principle—Code of Civil Procedure  
(Act V of 1908), S. 110.*

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In a suit on a mortgage for sale of the mortgaged property, the plaintiff impleaded not merely the person who claimed under the mortgagor, but also the appellant who had set up adverse claims to the mortgaged property.

*Held*, that the cause of action against the appellant, viz., the right to obtain a declaration of title against his adverse claim, was quite distinct from the cause of action against the mortgagors and persons claiming under them, viz., the enforcement of rights under the mortgage; and that such joinder of parties and causes of action was irregular and embarrassing.

The trial Court held that the appellant thus irregularly impleaded, was entitled to a small portion of the land subject of the mortgage. The High Court on appeal reversed this finding and included such portion in the mortgage decree. The appellant applied for a certificate to appeal to the Privy Council. The plaintiff opposed on the ground that the land in dispute was below Rs. 10,000 in value. The High Court however granted the certificate on the ground that the decree imposed upon the land a liability in respect of the whole of the amount of the mortgage which was more than Rs. 10,000. In the Privy Council the plaintiff respondent took the objection that the appellant was not competent to maintain the appeal as of right, inasmuch as the value of the subject matter of the appeal was below Rs. 10,000.

*Held*, that this objection must prevail; that the subject matter of the dispute in appeal was simply the value of what the appellant claimed, and that for the purpose of the certificate the value of the mortgage was immaterial.

A certificate which on the face of it proceeds on a wrong principle is not conclusive of the certificate-holder's right to appeal.

Appeal from a decree of the Allahabad High Court (March 12, 1912), (Griffin and Chamier, JJ.) dated the 12th March 1912, modifying a decree of the Subordinate Judge of Aligarh (June 8, 1910).

Some biswas odd of mouza Mubarakpur were mortgaged in 1884 by Musammatt Mahtab Kunwar to respondent's predecessor. In 1898 the same land was mortgaged by one Hukum Singh to appellant.

Respondent brought this suit for sale of the mortgaged property and impleaded appellant and certain others who laid claim adversely to the mortgagor to parts of the mortgaged property. The Subordinate Judge found that Hukum Singh was entitled to two biswas odd, and in consequence excluded his share from the mortgage decree which he gave to respondent. On appeal the High Court reversed this finding and gave respondent a mortgage decree for the whole.

On appellant's application for a certificate under section 110 of the Code of Civil Procedure, 1908, the following order was passed by Richards, C. J., and Banerji J :

"This is an application for leave to appeal to His Majesty in Council. The value of the subject matter of the suit in the Court below

exceeds Rs. 10,000. This Court reversed the decision of the lower appellate (sic) Court ; and therefore if the value of the subject matter of the proposed appeal exceeds Rs. 10,000 the case is one which fulfils the requirements of section 110 of the Code of Civil Procedure. It is, however, urged that the value of the subject matter of the proposed appeal to His Majesty does not exceed Rs. 10,000, and this contention is based on the following facts. The suit was one to recover Rs. 38,000 and odd by enforcement of a mortgage. A part of the property comprised in the mortgage was exempted from liability under the mortgage by the Court below. An appeal was preferred to this Court, and it was held that the whole of the mortgaged property was liable to sale in enforcement of the mortgage. It is in respect of this part of the decree of this Court that the applicant seeks to appeal to His Majesty in Council. It is alleged that the value of the property, which by the proposed appeal is sought to be exempted from liability under the mortgage and decree passed on it is Rs. 2,000 odd, and this amount must be regarded as the value of the subject matter of the appeal to His Majesty. We do not agree with this contention. The decree imposes on the property a liability for Rs. 38,000 and odd. Therefore the value of the subject matter of the appeal to His Majesty is a sum exceeding Rs. 10,000 and the case fulfils the requirements of section 110. We so certify."

In his case lodged at the Privy Council respondent took the objection "that the appellant is not competent to maintain the present appeal as of right, inasmuch as the value of the subject matter of the appeal is below Rs. 10,000."

*Sir W. Garth*, for the appellant, submitted on the preliminary objection of the respondent that the subject matter in dispute was above Rs. 10,000. The High Court had so certified, notwithstanding respondent's opposition. The suit was for Rs. 38,000 odd. There was no evidence of the value of the property disputed in the appeal, but that is not our fault ; the High Court did not require any. They state the valuation which respondent put upon the property but they do not say that they adopt that valuation. Section 110 of the Code of Civil Procedure contemplates that the High Court decision as to value shall be final. If it is not, we ought to have an opportunity of proving that the value of the land in dispute is over Rs. 10,000.

*De Gruyther, K. C.* (*B. Dube* with him) for respondent : The amount of value of the subject matter in dispute on appeal to the

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Privy Council must be Rs. 10,000 or upwards : Code of Civil Procedure (Act V of 1908), section 110. The High Court did not deny our allegation that the value of the land in dispute was Rs. 2,000 only. Unless that were tacitly accepted it would have been unnecessary for them to discuss the proposition on which they base their order. It is most improbable that this small share would be worth Rs. 10,000 and it does not appear that appellant even contended before the High Court that it was. The High Court have confused the value of the mortgage with the value of the land in dispute. There is no question of the appellant's personal liability ; it is only these two biswas which are in dispute, and they are not worth anything like Rs. 10,000. A certificate is not conclusive as to value when, on the face of it, it is based on a wrong principle : *Banarsi Pershad v. Kashi Krishna Narain.* (1)

*Sir W. Garth*, in reply : The High Court order leaves the question of the value of the two biswas open. It is not our fault, there is no evidence on this. We ought to be allowed, if the certificate is not acceptable, to adduce such evidence now.

The judgment of their Lordships was delivered by

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**The Lord Chancellor :—**It is always to be regretted when an appeal is disposed of on a preliminary point, and the parties are compelled, after having incurred considerable expense, to leave this Board without a determination of the real merits of their dispute. But in this case their Lordships feel that they have no choice in the matter, and that they are bound to advise His Majesty that the preliminary point raised must prevail.

The facts of this case are these : In 1884 a mortgage was executed of certain property for a sum of 2,000 rupees, with interest at 12 per cent. On the 30th November, 1909, the persons who were entitled to the benefit of that mortgage took proceedings in order to have it enforced. They claimed that the amount due upon the mortgage was 38,494 rupees, and they asked for an order for payment of that sum against the defendants, and a sale of the property. They made, as parties to that suit, not merely the people who claimed under the mortgagors, but also certain people who had set up adverse claims to the mortgaged property, among whom the appellant was one. Their Lordships think that this joinder of these parties was irregular, and that it could only tend to confusion.

What followed was this : The present appellant, who claimed through a person named Hukum Singh, said that she was entitled to four biswas of the property. That dispute was entirely

(1) (1900) L. R. 28 I. A. 11 ; I, L, R. 23 All. 227.

independent of the mortgage transaction of 1884. Whatever the amount of that mortgage might be, in no circumstances could the appellant have been made responsible for it. If it had been held that her claim was good the mortgagor would have completely failed, so far as her share of the estate was concerned : if it had been held that her claim was bad she could have had no right whatever to redeem the mortgage. The cause, however, proceeded without any objection being taken, and, in the end, on the 8th June, 1909, a decree was made by the Subordinate Judge, in which he declared that the appellant was entitled to one-half of the four biswas which had been set up as her original claim. From that decree an appeal was taken to the High Court, and on the 14th November, 1910, the High Court decided that the appellant had no title at all. The result was that as to one-half there were concurrent findings both of the Subordinate Judge and of the High Court that the appellant had no claim, and as to one-half there were differing judgments. The appellant accordingly sought to obtain leave to appeal to His Majesty in Council from the judgment of the High Court, and for that purpose it was essential that she should satisfy the condition of section 110 of the Civil Procedure Code of 1908. That section provides that an appeal can only be allowed in certain cases where the amount or value of the subject matter of the suit in the Court of First Instance was 10,000 rupees, or upwards, "and the amount or value of the subject matter in dispute on appeal to His Majesty in Council must be the same sum or upwards."

Upon the appellant's application for a certificate that the value of the subject matter exceeded the 10,000 rupees there appears to have been argument before the High Court, and a certificate has been given in her favour. But it is objected that that certificate, on the face of it, proceeds upon a wrong principle, and that this Board ought not to regard it as conclusive of the appellant's right to appeal.

Their Lordships think that the respondent's contention in this respect is correct. The certificate is prefaced by an order in which the High Court state what the reasons were that led them to the conclusion that the subject matter was above the prescribed limit, and it is quite plain, on an examination of that order, that they were deciding as between two rival contentions. The one that was put forward on behalf of the respondent was that in point of fact the appeal related only to the value of the two biswas, while the appellant asserted that it related to the whole subject matter of the suit, which was 38,000 rupees. This latter argument was enforced by suggesting that if the appellant's case failed the mortgage

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would operate over the whole of the property, and there would be a right left in the mortgagees to sell and dispose of this piece of the estate for the total value of the mortgage debt ; that as the mortgage debt affected equally every part of the property subject to the original mortgage, it affected the whole of those two biswas, and the subject matter of the disputes therefore was 38,000 rupees. This contention prevailed before the High Court, and they state in terms that the decree which was the subject of appeal had imposed on the property a liability for 38,000 rupees, and that, in consequence, the value of the subject matter of the appeal exceeded the necessary prescribed sum.

Their Lordships think that this was an entire mistake. As between the respondent, who was seeking to enforce his mortgage, and the appellant the subject matter of the suit was not 38,000 rupees. The subject matter of the dispute was simply the value of the property which the appellant claimed, and it was quite immaterial for that purpose what the value of the mortgage might be. As has already been pointed out, the appellant could under no circumstances have been made responsible for the amount of the mortgage, nor could its extent in any way whatever have in the least degree varied her rights. In truth the confusion has arisen because the cause of action against the appellant, that is to say, the right to obtain a declaration of title against her adverse claims, has been joined with another which was quite distinct, the enforcement of rights under a mortgage.

Their Lordships think that the subject matter of this appeal is nothing but the two biswas to which the Subordinate Judge found that the appellant was entitled.

Then Sir William Garth urges that, in these circumstances, as this question of the value has never been determined by the High Court, the matter ought to go down for the purpose of seeing whether those two biswas would support the value of 10,000 rupees, and thus enable an appeal to be maintained. After considering all the arguments upon this point, their Lordships think that, out of consideration for the parties themselves, no such direction ought to be given. Had it been possible, when the original certificate was applied for, to have established that the value of those two biswas exceeded the 10,000 rupees—a perfectly simple and straightforward thing to do—all this difficulty as between the value of the estate and the value of the mortgage would at once have vanished, but it seems impossible to read the judgment of the High Court without seeing that there were two contentions, and only two, before them. Upon the one

contention the appellant would have failed, and that was that the subject matter of the suit related to the two biswas, and on the other contention she would have succeeded, and that was that the subject matter of the suit was affected by the value of the mortgage debt. It was the latter contention which the High Court wrongly adopted.

Their Lordships will therefore humbly advise His Majesty that this objection must succeed, and that this appeal should be dismissed with costs.

*Douglas Grant* :—Solicitor for the Appellant.

*Barrow, Rogers & Nevill* :—Solicitors for the Respondent.

J. M. P.

*Appeal dismissed.*

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PRESENT :—*Lord Shaw, Lord Parmoor and Mr. Ameer Ali.*

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*June 22,  
and July 10.*

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

*Hindu Law—Widow's estate—Position of reversionary heirs—Declaration of right—Reversioner not entitled to such declaration while the widow lives—Representative capacity of reversioner suing to prevent waste.*

A Hindu widow's right with respect to the estate of her deceased husband is of the nature of a right of property ; her position is that of owner ; her powers in that character are, however limited ; but so long as she is alive no one has any vested interest in the succession. While she is alive, it is futile to make a declaration who is the reversionary heir of her deceased husband which might be rendered valueless by the development of events.

A reversionary heir although only having a contingent interest is recognised by the Courts as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life ; but such heir thus appealing to the Court does so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion.

Where the respondent, a reversionary heir, sued for an injunction and for the appointment of a receiver alleging waste by the appellant, a widow, who denied that the respondent was the reversioner, and it was found that the charges of waste were unfounded, but the respondent was granted a declaration that he was the "next reversionary heir" under cover of his prayer "for further relief."

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*Held*, that he was not entitled to such a declaration.

*Thakurani Jaipul v. Bhaiya Inder* (1) and *Venkatanarayana Pillai v. Subbammal* (2).

Appeal from a decree of the Madras High Court (August 23, 1912), affirming a decree of the Subordinate Judge of Mayavaram, (October 28, 1907).

Respondent, claiming to be the reversionary heir to the property of one Ramasami Iyer after the death of the appellant (the widow) and her husband's mother, instituted a suit against appellant on allegations of waste, and prayed for (a) an injunction, (b) a Receiver, (c) further relief, and (d) costs.

Appellant in her written statement pleaded *inter alia* that respondent was not the next reversionary heir.

The trial Court and the High Court both found that the allegations of waste were unfounded, but they both gave the plaintiff a declaration that he was the nearest reversioner to the deceased after the lifetime of the widow and her husband's mother. The trial Court made no order as to costs and the High Court directed that the parties should bear their own costs. The learned Judges of the High Court (Miller and Abdur Rahim JJ.) observed that "though the declaration asked for in the plaint was not essential yet the peculiar circumstances of this class of suit seem to make it not undesirable that it should remain to prevent further litigation on the question between the plaintiff and the first defendant (appellant) should the former find it necessary to attack again the latter's management of the estate."

Hence this appeal by the Defendant.

*Kenworthy Brown*, for the appellant: I cannot dispute the substance of the declaration, but I dispute the power of the Court to make it under the circumstances of the case. It was not prayed for specifically and has been granted under a general prayer for further relief.

The next reversioner has no vested right. The declaration gives him such a right and is wholly wrong. A declaration like this never has been made, and cannot be made: in any case it is too wide. Till the female owner dies it cannot be predicted who will be the nearest reversioner at the time of her death: *Venkatanarayana Pillai v. Subbammal* (2).

As to the position of a Hindu widow, and the power to restrain

(1) (1904) L. R. 31 I. A. 67; I. L. R. 26 All. 238.

(2) (1915) L. R. 42 I. A. 129; 21 C. L. J. 515.

waste by her, vide Mayne's Hindu Law, 8th Ed., paras 605, 624 and 647.

The suit was brought by plaintiff in a representative character as representing all the reversioners : in such a suit he is not entitled to such a declaration : *Davis v. Angel* (1), *Moothoo Nachiar v. Dorasinga Tever* (2), *Hammerton v. Earl of Dysart* (3).

*Raikes*, for the respondent : The appellant contended that the respondent was not entitled to sue. The suit went to trial on that issue and a great deal of evidence was taken and expense incurred. The declaration is of use to me as in case of waste, respondent will not have to incur this expense over again. Both Courts below have exercised their discretion in giving the declaration, and this Board will not interfere with that exercise.

The law as declared in *Kathama Natchiar v. Derasinga Tever* (2) was subsequently altered by section 42 of the Specific Relief Act (I of 1877) ; that case is no longer an authority.

The plaintiff may not have a vested right in the property but he has a right to it within the meaning of section 42, for he is entitled to sue to prevent waste thereof.

(Reference was made to *Thakurain Jaipal v. Bhaiya Inder Bahadur*, (4).

No reply was called upon.

The judgment of their Lordships was delivered by

**Lord Shaw** :—This is an appeal from a decree of the High Court of Judicature at Madras of the 23rd August, 1912, modifying the decree of the Subordinate Judge of Mayavaram, dated the 28th October, 1907.

The suit was brought with reference to the estate of one Ramasami Iyer, of Konerirajapuram, who died intestate on the 24th June, 1906. It is not disputed that the widow holds the property under the Hindu law as "a widow's estate." The mother of the late owner is the person entitled to succeed should she survive this widow. On the expiry of these lives the estate will descend to the next reversionary heir of the deceased.

The rule of the Hindu law with regard to the nature of the widow's estate may have been subject to various forms of expression, but in substance it is not doubtful. Her right is of the nature of a

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(1) (1862) 4 De Gex F. and J. 524 (529).

(2) (1875) L. R. 2 I. A. 169 (172, 181); 23 W. R. 314.

(3) L. R. (1916) A. C. 57 (123) reversing L. R. (1914) 1 Ch. 822.

(4) (1904) L. R. 31 I. A. 67; I. L. R. 26 All. 238.

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right of property ; her position is that of owner ; her powers in that character are, however, limited ; but, to use the familiar language of Mayne's "Hindu Law," paragraph 625, p. 870, "so long as she is alive no one has any vested interest in the succession." These propositions were not disputed.

The law as to the situation of the reversionary heirs is also in substance quite clear ; there is, as stated, no vesting as at the date of the husband's death, and it follows that the questions of who is the nearest reversionary heir or what is the class of reversionary heirs fall to be settled at the date of the expiry of the ownership for life or lives ; that is to say, in the present case, at the death of the survivor of the appellant and her late husband's mother. Even where the Courts have proceeded, prior to the opening of the succession, to give any declaration, this has been done for special reasons only, as in the case of *Thakurain Jaipul Kunwar v. Bhaiya Inder Bahadur Singh* (1), and—to use the language of Sir Arthur Wilson (p. 70)—it is made clear that "whenever the succession opens by the death of the widow the present decision will have settled nothing as to who should succeed."

It follows from this state of the law that it is impossible to predicate at this moment who is the reversionary heir of the deceased proprietor. If a Court of Law proceeded to make any declaration of right upon that subject such a declaration would be subject to being rendered valueless by the development of events. It would not, after events had developed, be even of authority in regulating or declaring the rights of the present respondents as against any other claimant to the character of reversionary heir. *A priori*, accordingly, a declaration of right granted at the present stage would appear to be stamped with something in the nature of futility.

It is also true that a reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a *spes successionis*, is recognised by Courts of Law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life.

But a reversionary heir thus appealing to the Court truly for the conservation and just administration of the property does, so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion. The law on this subject was recently expounded in the judgment of this Board delivered by Mr. Ameer Ali in *Venkatanarayana Pillai v. Subbammal* (2).

(1) (1904) 31, I. A. 67 ; I. L. R. 26 All. 238.

(2) (1915) 42 I. A. 129 ; 21 C. L. J. 515.

This representation is in law founded upon a different set of considerations from those which would seek to stamp the character of reversionary heir upon one individual. The latter operation attempted during the enjoyment of the life estates would necessarily be premature, and might, as stated, be futile. The former is justified by the considerations of keeping the estate in tact for the persons to whom as reversioners it shall ultimately and at the proper time be determined that the estate shall go.

The suit in the present case was brought by the plaintiff against the defendant and appellant, making charges of a serious character against the conduct and management of the estate by the deceased's widow. Collusion, concealment, maladministration, malice, and fraud were charged, and the statement was made that heavy loss would be incurred if the properties were left in her possession—subject to waste by her. The appointment of a receiver upon the estate was prayed for, and an injunction was asked restraining the widow from doing any act injurious to the plaintiff's reversionary interest. The third prayer of the plaint was for "granting such further relief as to the Court may seem fit and proper."

It may be at once said that, of the serious charges made, none were held to be well founded in fact : and no reason was found by the Courts below either for the appointment of a Receiver or the granting of an injunction. By the decree of the Subordinate Judge, however, of date the 28th October, 1907, the following order was made, namely, "that plaintiff is declared to be the next reversionary heir of the deceased Ramaiyar after the lifetime of defendants Nos. 1 and 2" (his widow and mother). This was done under the third prayer just referred to. For the reasons above set forth it is plain that such a declaration is unavailing as well as premature. It appears to have arisen on account of a dispute as to whether the plaintiff's relationship to the deceased had been made out, and the Courts below may have been misled by the circumstance of that dispute into permitting the question of a declaration to enter the decree. The form of the declaration was that the plaintiff was "the next reversionary heir."

In their Lordships' opinion the plaintiff-respondent was not entitled to such a declaration. Had waste of, or danger to, the estate been established, the title of the plaintiff to bring those matter before the Court in his representative capacity as a possible reversionary heir would have been allowed, and a decree following upon the finding of fact of such waste or danger would have followed. But the whole of that part of the case has failed. And in their

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Lordships' opinion the case must accordingly be treated as if the suit had been directed *simpliciter* to a declaration of the plaintiff's individual right. In the view of the Board it is not legitimate to give a plaintiff, under cover of a request for "further relief," after all the substantial heads of a claim have failed, greater right to obtain a declaration than he would have had if such a declaration had been asked directly and unaccompanied by other and unfounded claims.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the suit should be dismissed, and that the respondent do pay the costs before the Board and in the Courts below.

*Douglas Grant* :—Solicitor for the Appellant.

*Chapman-Walker and Shephard* :—Solicitors for the Respondent.

J. M. P.

*Appeal allowed.*

PRESENT :—*Lord Shaw, Sir John Edge and Sir Lawrence Jenkins.*

PRANJIVANDAS JAGJIVANDAS MEHTA

v.

CHAN MAH PHEE

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA].

*Equitable mortgage—Deposit of title deeds—Written or oral bargain accompanying it—Notandum on the back of a Promissory note—Limitation of Security.*

Where documents of title deeds of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the documents, but where the documents of title are handed over accompanied by a bargain, the bargain must rule the scope of the security, and when the bargain is a written bargain, it, and it alone must determine what is the scope and the extent of the security.

*Shaw v. Foster* (1) followed.

Where a borrower deposited with the lender documents of title to immovable property and granted him a promissory note on the back of which showed there was a notandum signed by the parties which showed that a part only of the property was security for the loan :

*Held* that the rights of the parties must be determined by the written agreement, the notandum, and that the equitable mortgage in favour of the lender extended only to the part of the property referred to in the notandum.

(1) (1872) L. R. 5 Eng. and Ir. App. 321 (340).

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Appeal from a judgment and decree of the Chief Court of Lower Burma in its appellate civil jurisdiction (May 6, 1914) varying a judgment and decree of the same Court in its original civil jurisdiction (August 16, 1911).

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On October 10, 1902, Ko Tha Gywe borrowed Rs. 5,000, from Revashankar Jagjivan & Co., depositing with them as security the following four documents of title ; (1) a building lease, dated April 2, 1884, from the Secretary of State for India to one Maung Bwa of a plot of land for five years, the tenancy to continue thereafter until terminated by either party giving three months' notice in writing ; (2) a building lease, dated July 1, 1884, also from the Secretary of State for India to Ma Thit, the wife of Ko Tha Gywe, of another plot for the same term and on the same conditions ; (3) a sale deed, dated January 5, 1888, whereby the said Maung Bwa assigned to Ma Thit a dwelling house described as situated in 14th. Street, Rangoon, and the plot of land on which it stood for the residue of the term created by the said lease of April 2, 1884 ; and (4) a sale deed, dated January 3, 1901, whereby Ko Tha Gywe purchased a house "known as No. 88, situated in 14th. Street, Rangoon". Ko Tha Gywe died sometime in 1902, and his daughter Ma Saw took over his liability under the loan, executing on January 1, 1903, a promissory note for Rs. 6,000 in favour of the said firm and keeping the deposit of the said title deeds with them as security. Subsequently she borrowed from time to time further sums from the firm, the same documents remaining in its possession. On June 1, 1905, Ma Saw and her husband gave the firm a promissory note for Rs. 13,000 in respect of the total amount due to the firm at that date, keeping deposited with it the said four documents as security. On the back of this promissory note there was the following signed by the Ma Saw and firm :—"As security, grant of a house in 14th. Street, Rangoon". In December 1906 the Appellant acquired the business of the firm and the last promissory note was endorsed to him and the said four documents of title were delivered to him.

In 1908 Ma Saw obtained from the Government two fresh leases in respect of the whole of the land covered by the deposited documents. The whole land was divided into four plots numbered 65, 66, 66a, and 67. One of the two leases was in respect of the first three plots and the house standing upon them, which was then known as No. 92 Strand Road, Rangoon. The other lease was in respect of plot 67 and a house standing upon it, known as No. 87, 14th. Street, Rangoon. These four new plots and numbers did not correspond with the three plots referred to in the deposited

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documents, but it appeared, as their Lordships found, that the house on plot No. 67 was that which had been sold to Ko Tha Gywe by the sale deed of January 3, 1901.

In 1909 the appellant brought the suit giving rise to this appeal, against Ma Saw and her husband and another, on the promissory note claiming, *inter alia*, a declaration that he was entitled to a valid charge upon the whole property. At the date of the suit a judgment creditor of Ma Saw had attached in execution of a money decree against her the four plots with the two houses thereon. The appellant, claiming to have an equitable mortgage on the whole property, applied to the Court that the sale should be made subject to his charge. The proclamation of sale accordingly stated that the appellant claimed to have an equitable mortgage for Rs. 13000 and interest. At the sale the appellant purchased plot No. 67 with the house known as No. 87, 14th. Street, and the respondent purchased plots Nos. 65, 66 and 66a with the house known as No. 92 Strand Road. The respondent was thereafter made a defendant in the suit. Robinson J., who tried the suit decreed it against all the defendants. The material part of his judgment was as follows :—

“Plaintiff's agent has deposed in detail to the various loans made to defendant 1 and her deceased husband and to their having finally on a settlement of account executed the promissory note for Rs. 13000. He has proved payments of interest and has satisfied me that the claim he made in paragraph 6 of the plaint is a just claim. Plaintiff further proves that at the time of the execution of this promissory note the title-deeds of the property in suit consisting of two leases and two sale-deeds were deposited with him as security for the payment of prior loans and that there was an agreement that these title-deeds should be deposited as security for the repayment of the promissory note. It has also been proved that plaintiff at the request of defendant 1 paid the sum of Rs. 1023 under the following circumstances. The leases of the sites had expired and some years afterwards the persons who occupied the lands were called upon by Government to take out fresh leases for which premia had to be paid. These premia were payable by instalments and defendant 1 having got into arrears in respect of these payments notices were served on her in respect to two sites threatening that if she did not pay the premia due, the property would be brought to sale. She approached the plaintiff and in order to save his security he paid Rs. 1023 for her at her request. I must hold that he has a lien for this amount on the properties. I will, therefore, grant the declaration that he asked for, viz., that Rs. 15,328-7-0 be paid to him

with further interest on the said sum of Rs. 13,000 from date of suit till realization at Rs. 1-2-0 per cent per mensem ; also a declaration that the plaintiff has a valid equitable mortgage on the property in the suit for the amount due on the promissory note and a lien for the Rs. 1023. Further that this equitable mortgage is entitled to priority over the mortgage of defendant 3.

The respondent alone appealed and his appeal was allowed by Hartnoll, Officiating Chief Justice, and Towney J., who set aside the decree appealed from in so far as it related to the respondent and dismissed the suit as against him. They were of opinion that only one house was given as security, that that house was No. 87, 14th. Street purchased by the appellant, and that "on the evidence produced by the plaintiff it cannot be held that the title-deeds of the Strand Road house were delivered to the lenders by way of security."

The appellant thereupon appealed to His Majesty in Council.

De Gruyther, K. C., and *J. M. Parikh*, for the appellant :

The appellant has an equitable mortgage in his favour on the whole of the property. The equitable mortgage is conclusively proved by the fact that the documents of title to the whole of the property were deposited with and remained in the possession of the lenders. The charge is evidenced by the deposit of title-deeds and is not limited by a subsequent memorandum : *Ashton v. Dalton* (1) and *Ex parte Kensington* (2). The note on the back of the promissory note is not and was not intended to be the contract between the parties, and notwithstanding that note the appellant is entitled to show by other evidence what the real contract between the parties was : Indian Evidence Act, 1872 sections 91 and 92, proviso 2. At the time of the first transaction there was only one big house with a stable on the plots. That house is now known as No. 92 Strand Road, and the stable is now known as No. 87, 14th Street. Hence the whole property is referred to as one house and the note on the back of the promissory was intended to show that the same security was to continue. If it be held that the charge was limited to one house it submitted that the evidence shows that that house was the one purchased by the respondent. Moreover, Ma Saw has admitted that both houses together with the four plots on which they stand are subject to the appellant's equitable mortgage. Again, the case was decided in the Court of first instance on the footing that if there was a charge at all, it extended to the whole of the property, and the question that the charge was only on the house purchased by

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the appellant but not on the house purchased by the respondent, was raised for the first time in the Court of appeal, which Court erred in entertaining and deciding such a question of fact.

Sir H. Erle Richards, K. C. and *F. J. Coltman* for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

Lord Shaw :—Their Lordships think it unnecessary in this case to call upon learned Counsel for the respondent. They are of opinion that the judgment of the Chief Court of Lower Burma appealed from is correct.

The rights of the parties have to be determined, in their Lordships' opinion, by a written agreement, which is, in their Lordships' view, the limit and standard fully measuring the obligations of Mah Saw, who obtained an advance of 13,000 rupees from the respondent on the 1st June, 1906.

On that date there was a notandum put upon the back of a promissory note then granted, and the notandum is to this effect : "As Security, grant of a house in 14th Street, Rangoon." Their Lordships take no stock of an alteration made after that notandum was signed, by which there was an interpolation of the words "Strand Road and," which words would have in appearance at least, extended the scope of the security from "a house in 14th Street, Rangoon," to "a house in Strand Road and 14th Street, Rangoon." Had an argument been raised as to whether, this alteration having been made, any rights in law could now be founded upon this document, that argument would have been considered : but it is unnecessary to make any pronouncement upon this topic, and accordingly their Lordships deal with the document signed by Mah Saw on the 1st June, 1906, as definitely limiting and describing the scope of the security. It was a "grant," in the singular, "of a house," in the singular, "in 14th Street, Rangoon."

The law upon this subject is beyond any doubt. (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security. In the words of Lord Cairns in the leading case of *Shaw v. Foster* (1) :—

"Although it is a well-established rule of equity that a deposit of a document of title, without more, without writing, or without word of mouth will create in equity a charge upon the property referred

(1) (1872) L. R. 5 Eng. & Ir. App. 340.

to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

Their Lordships accordingly have admitted in argument the only possible question which remains (standing the document specifying the security and signed by Mah Saw), namely, the question of identification of the term "grant of a house in 14th Street, Rangoon." To identify this grant, a reference has been made by learned counsel for the appellant, to the various title-deeds of the properties called Plots 65, 66, 66A, and 67. These deeds are as follows: With reference to Plot 65, there is a lease of land in favour of a person named Ma Thit, who was the mother of Mah Saw. With reference to Plot 66, and apparently also to 66A, there is a document for sale of a house and of land in favour of Ma Thit. But then, with reference to the last document, namely, as to Plot 67, there is a "grant of a house," a conveyance of a house on the 3rd January, 1901, in favour of Ko Tha Gywe. Ko Tha Gywe was the husband of the grantee, or lessee, of the other plots of ground covered by the other documents. He was the father of Mah Saw, and it does occur as a matter of interest that this person, the father of Mah Saw, who had a conveyance of a house, that on Plot 67, was himself a borrower from the persons who are interested in this suit, who were bankers and money-lenders in the district. On the 10th October, 1902, he borrowed a sum of 5,000 rupees from them; and a somewhat curious transaction took place, namely, that he deposited with the money-lenders, not only the title of the property belonging to himself, namely, the grant of the house, but also the title-deeds of the other three properties which belonged not to himself, but to his wife. It was on this occasion that all these titles found their way into the hands of the lenders. Mah Saw succeeded to Ko Tha Gywe in the ownership of the house on Plot 67.

Their Lordships have, in these circumstances, no doubt whatsoever that the identification of the "grant of a house in 14th Street, Rangoon," by her is accomplished by a reference to the conveyance of the house in favour of Ko Tha Gywe, which house had been his property when the original advance of 5,000 rupees, some years before, was obtained by him.

Their Lordships finally remark that, as against this identification of the house in 14th Street there is no evidence at all satisfactory in

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this case, and it was for the persons holding this security clearly to satisfy the Court of the scope thereof. They have not done so. There is nothing in the case which confirms the view that, under the term "grant of a house," which would be a singular term applicable to a singular title, there was included the subject of three other plots of land under leases. Their Lordships cannot assent to such a construction. They think the security is distinctly and by contract limited, and they cannot extend it as desired. They have no doubt that the Chief Court of Lower Burma has reached a proper conclusion.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

E. Dalgado :—Solicitor for the Appellant.

Arnould & Son :—Solicitors for the Respondent.

J. M. P.

Appeal dismissed.

PRESENT :—*Lord Atkinson, Lord Parker of Waddington,
Sir John Edge and Mr. Ameer Ali.*

RAMDAS VITHALDAS DURBAR

v.

S. AMEERCHAND AND CO. AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Indian Contract Act (IX of 1872), Secs. 102, 103, 108 and 178—Stoppage in transitu—Expressions 'document showing title,' 'document of title,' and instrument of title' to goods—Test to be applied in determining whether a document is a document of title—Railway receipts are instruments of title—Assignment by endorsement of railway receipts by the buyer by way of pledge—Right of unpaid vendor—Transfer of Property Act (IV of 1882), Secs. 4 and 137.

Whenever any doubt arises as to whether a particular document is a 'document showing title' or a 'document of title' to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented.

In the present case both Courts in India having found that the railway receipts in question satisfy the test, their Lordships held that even apart from sections 4 and 137 of the Transfer of Property Act, 1882, (as amended), the said receipts were documents showing title to goods within sections 102 and 108 and documents

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of title within the meaning of section 178, and also instruments of title within the meaning of section 103 of the Indian Contract Act, 1872; and consequently as the said railway receipts were assigned by endorsement by the buyer of the goods to the respondents respectively by way of pledge to secure advances made specifically on them, the seller could not have stopped the goods in transit without payment or tender to the respective respondents of the amounts of their advances.

In the Indian Contract Act the three expressions, (1) 'document showing title', (2) 'document of title', and (3) 'instrument of title' are used in the same sense.

The Indian Contract Act, 1872, is an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law, and there is no improbability in the Indian legislature having at the time of passing that Act, taken the lead in a legal reform of the law of contract for which England had to wait several years thereafter.

S. Ameerchand and Co. v. Ramdas Vithaldas (1) affirmed.

Two consolidated appeals from a judgment and decree of the High Court of Bombay, (Sir Basil Scott C. J. and Chandavarkar J.) dated the 31st March 1913, reversing in the first appeal two judgments of Mr. Justice Macleod, dated the 11th January and the 9th December 1912 respectively, and in the second a judgment of Mr. Justice Beaman, dated the 12th February 1912.

The appellants were commission agents carrying on business at Bagalkote in the district of Bijapore, and in the course of their business they consigned certain cotton to their constituents Chhaganlall Kalidass of Bombay. The cotton was carried by rail by the Madras and Southern Mahratta Railway Company as far as Marmagoa and by sea by the Bombay Steam Navigation Company from Marmagoa to Bombay. The Railway Company issued railway receipts for the goods for the whole transit both by rail and sea upon certain terms and conditions of which the following only need be mentioned :—

Condition 3.—That the Railway receipt given by the Railway Company for the articles delivered for conveyance must be given up at destination by the consignee to the Railway Company or the Railway may refuse to deliver, and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery. If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may at the discretion of the Railway Company be withheld until the person entitled in its

(1) (1913) I. L. R. 38 Bom. 255.

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opinion to receive them has given an indemnity to the satisfaction of the Railway Company.

Condition 9.—That goods booked to or over...shipping lines are subject to the rules and regulations and to wharfage and other charges in force on such...shipping lines over and by which they are conveyed.

The railway-receipts were sent by the appellants to their consignees and the latter assigned and endorsed over two of them covering 135 bales to the respondents in the first appeal to secure an advance made to them by the said respondents of Rs. 15,000 and interest, and one covering 73 bales to the respondents in the second appeal to secure a similar advance of Rs. 8,800 and interest.

While the said goods were in transit the appellants alleging that the consignees were insolvent gave notice to the Bombay Steam Navigation Company upon one of whose vessels the goods were shipped claiming to stop them in *transitu*. The respondents also claimed the goods from the said Company as holders of the said receipts for valuable consideration.

The Navigation Company thereupon on the 15th August, 1911, instituted the present suits under Order 85 of the Civil Procedure Code, 1908, against the appellants, the respondents and the consignees praying that the defendants might be required to interplead together concerning their claims to the said goods.

On the 11th January, 1912, the learned Judge delivered judgment. He said that it would be simplest to decide first as between the consignor and consignees whether the former was entitled to stop the goods and if this was decided in his favour to consider next whether the consignor was bound to satisfy the claim of defendant No. 2 (the respondents in the first appeal) under section 103 of the Contract Act before he could get possession of the goods. He decided the first question in favour of the consignor; and then held that the railway-receipts were not instruments of title under the section, that they had not been made so by section 137 of the Transfer of Property Act, and that even if a custom were proved that in Bombay such receipts passed by endorsement and delivery and were considered as representing the goods this could not affect the right of the first defendant to stop the goods. He accordingly answered the second question in the negative and gave judgment for the first defendant with costs.

The second defendant (the respondent in the first appeal) thereupon appealed to the High Court and after it had been pointed out on his behalf that the learned Judge had decided not to try issues 7,

8 and 9 and had stopped cross-examination on those issues the High Court remanded the case in order that evidence might be recorded on those issues and that they should be tried.

The case was accordingly remanded and further evidence was adduced and on the 9th December, 1912, the learned Judge delivered judgment on the remand. He held upon the seventh issue that the second defendant had advanced the Rs. 15,000 in good faith and that the railway receipts in question were endorsed to him as security for the general balance due to him including the Rs. 15,000 ; upon the eighth that the consignor was not aware that it was the usual course of business for the consignees to raise money by pledging the railway receipts for the goods covered by them ; and upon the ninth that the evidence did not shew that there was any such usage and that if there was it was contrary to positive law. He accordingly again gave judgment for the first defendant with costs.

In the meantime the second suit came on for hearing before Mr. Justice Beaman and the parties agreed that judgment should be given in accordance with the first decision of Mr. Justice Macleod subject to appeal and the learned Judge on the 13th February, 1912, delivered judgment accordingly and an appeal was thereupon preferred therefrom to the High Court by the respondent in the second appeal.

Both appeals then came before the High Court and were dealt with in one judgment. The learned Judges held that in both cases the advances were made in good faith specifically upon the railway-receipts and had not been repaid ; and they further held that having regard to the fact that a portion of the transit was by sea the railway-receipts were instruments of title within the meaning of section 103 of the Contract Act ; that in any case by section 137 of the Transfer of Property Act such receipts had now been declared by law to be such instruments of title ; and that by the custom of the trade as proved by the evidence such receipts passed from hand to hand by endorsements and were considered as representing the goods and as entitling the last holder to delivery ; that they were treated as instruments of title within the meaning of section 103 of the Contract Act and that it followed as matter of law that the last endorsee was entitled to delivery as against an unpaid vendor who stopped the goods in transit. They accordingly reversed the decisions in the Courts below and decreed the appeals with costs. For a report of the case in the Courts below see *S. Ameerchand & Co. v. Ramdas Vithaldas* (1).

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The appellant thereupon appealed to His Majesty in Council.

*De Gruyther K. C.* (with him *Raikes*) for the Appellant: The question here is whether railway receipts are "instruments of title" within section 103 of the Indian Contract Act. I contend they are not. I rely upon condition 3 which does not contemplate assignment. The endorsement does not, by the form of the document itself, have the effect of sale or pledge. Nobody reading the document by itself could imagine that it was negotiable, or that title passed by endorsement. Delivery is made to the indorsee not as assignee, but as agent of the consignee.

The English Factors' Act of 1877 has never been extended to India. The Indian Contract Act corresponds with the English law as it was before 1877.

There can be no pledge of goods unless there is delivery actual or constructive—Indian Contract Act sections 76, 78, 148 and 172. For constructive delivery you must have an instrument of title, such as a Bill of lading.

The Transfer of Property Act, section 137, on which reliance has been placed by the Appellate Court, merely excludes the operation of the preceding sections as to actionable claims. It is a saving clause, not a provision as to what is negotiable. It was not intended to make negotiable what was not negotiable before. It does not alter the nature or character of any document or the mode of transfer provided by law. Section 4 of the Transfer of Property Act of 1882 does not make the Chapter on actionable claims as defined in section 3, part of the Indian Contract Act. "Document showing title to goods" in section 102 of the Indian Contract Act, means a document by which title passes alone.

Section 103 only refers to instruments of title which are negotiable, e.g., Bills of lading.

[Lord Parker referred to *Dublin City Distillery Co. v. Doherty* (1).]

If it is held that the legislature meant section 137 of the Transfer of Property Act, (II of 1900) to be read with sections 102 and 103 of the Indian Contract Act, there is an end of the case, but I submit they did not.

The English Factors' Act of 1842 was extended to India by section 4 of the Indian Factors' Act (Act XX of 1844), but the Act of

1842 applied only to agents for sale and hence it was that the English Factors' Act of 1877 was passed. But this latter Act was never extended to India, where the law applicable is to be found in section 108 (sale) and section 178 (pledge) of the Indian Contract Act. Hence no valid pledge was created. The endorsement of the receipt did not effect any assignment of the goods. The title did not pass by endorsement of a document which is not recognised as negotiable. The pledge of a document may create charges on the document, but not on the goods or property represented.

Section 108 of the Indian Contract Act reproduces section 4 of the Indian Factors' Act of 1844, which applied only to agents.

"Instrument of title" only refers to negotiable instruments similar to Bills of lading. Railway receipts are not instruments of title.

*G. I. P. Railway Co. v. Harmandas* (1), *Merchant Banking Co. of London v. Phoenix Bessener Steel Co.* (2).

*E. B. Raikes* followed : •The Railway receipts contemplate delivery to the consignee only. "Document" is wider than "instrument." The same phrase is used in section 102 and section 108. The delivery mentioned in section 101 is physical delivery, not delivery by a Bill of lading (section 90).

[Mr. Ameer Ali referred to Illustration (c).]

A Bill of lading does not put the goods in the possession of the holder.

[Lord Parker : At Common Law possession is always held to be delivered by a Bill of lading.]

Even if that be so, it would give possession whether or not the second buyer acted in good faith and for valuable consideration.

In England an alteration in the law was admittedly made by the Factors' Acts of 1877 and 1879. Was a similar alteration made in India 5 years before ? There does not appear to have been any case in which it has been held that the assignment of any document other than a Bill of lading can defeat stoppage in transit. Even in England the words of 40 and 41 Vict. clause 39, section 5 are not so wide as the text books make out. In India I submit the vendor's right of stoppage in transit is not defeated by an assignment similar to this.

*Sir Erle Richards K. C.* (with him *Sir W. Garth*) for the Respondent : I have three propositions. (1) "Instrument of title" is wide enough to cover these receipts. It has been held by both Courts that they give a right to delivery of the goods and are regarded by all persons in the trade as giving such a right. I rely on the judg-

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(1) (1889) I. L. R. 14 Bom. 57.

(2) (1877) L. R. 5 Ch. D. 205.

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ment of Jessel M. R. in *Merchant Banking Co. of London v. Phoenix Bessener Steel Co.* (1) when he held that a Delivery Order was an instrument of title.

(2) The other sections of the Indian Contract Act and other enactments show that the words cover railway receipts. "Documents of title" as used in the Factors' Act of 1844 as meaning documents giving right to delivery.

(3) There is no reason for limiting the meaning of instruments of title as suggested, in confining it to document *ejusdem generis* with Bills of lading which pass property. That was not the ground on which a Bill of lading got exempted at Common law. Lord Blackburn bases it on the principle that in the case of goods at sea attornment was impossible : he does not put it at all on the passing of the property. Benjamin on Sale bases it on contract. The law was not altered till 1877.

It is suggested as an argument for cutting down the words that such a course would be in accordance with English law. The whole trouble is due to the judgment of Sargent C. J. in *G. I. P. Ry. Co. v. Hanmandus* (2). There is no ground for saying that it was intended in the Indian Contract Act to follow the English law on this point, which at that time was doubtful. The Act is an "amending" Act. The words "instrument of title" could have been quite unnecessary if English law prevailed.

For the history of the English law on this subject vide Benjamin on Sale (5th ed.) pp. 847-851 ; and Carving's Carriage by Sea 5th ed. section 32, p. 684. After the decision in *Fariva v. Horne* (1), the law was as Lord Blackburn put it, till the Factors' Act was passed when the contest of opinion between the Courts and the mercantile community was settled in favour of the latter. The English law is now contained in section 10 of the Factors' Act of 1889 and section 47 of the Sale of Goods Act, 1893. If it had been intended to retain in India the one exception which obtained in England in 1872, there was no reason for having any section 103 of the Indian Contract at all.

The Transfer of Property Act (II of 1900) sections 4 and 137 bring a new chapter of the Transfer of Property Act into the Indian Contract Act. The legislature would never have done this if instrument of title meant something different in section 137 from what it does in section 103 of the Contract Act.

If the two phrases "instrument of title" and "document of title"

(1) (1877) 5 Ch. D. 205.

(2) (1889) I. L. R. 14 Bom. 57.

(3) (1846) 16 M. & W. 119.

meant something different, the legislation would not have used them together without distinguishing them in some way.

*De Gruyther K. C.* in reply: In 1872 there were other documents *ejusdem generis* with Bills of lading: Benjamin on Sale 5th ed. at p. 852 refers to *Lucas v. Dorrien* (1) and to sundry certificates and dock warrants.

The judgment of their Lordships was delivered by

**Lord Parker of Waddington**—The question which arises on these appeals is whether a railway receipt issued to the consignor of goods in the form appearing on pp. 70 and 71 of the record is “an instrument of title” within the meaning of section 103 of the Indian Contract Act.

Section 103 of this Act is one of a group of sections relating to a seller's right to stop goods while they are in transit to the buyer. Section 99 defines the right. Section 100 provides that goods shall be deemed to be in transit while in course of transmission to and not yet come into the possession of the buyer. Section 101 lays it down that the right does not, except in the cases thereafter mentioned, cease on the buyers reselling the goods while in transit and receiving the price, but continues until the goods have been delivered to the second buyer or to some one on his behalf. Section 102 provides that the right of stoppage ceases if the buyer, having obtained a bill of lading or other “document showing title” to the goods, assigns it, while the goods are in transit, to a second buyer, who is acting in good faith and who gives valuable consideration for them.

The expression “document showing title” is used again in section 108, which refers to a “bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods.” The same enumeration is found in section 178, except that in this section the expression “document of title” is substituted for “document showing title.” Sections 108 and 178, though they very possibly extend, at least cover the same ground as, the provisions of the Indian Act No. XX of 1844, which with certain modifications not material for the purposes of this appeal made the provisions of the English Factors' Act, 1842, applicable to British India. Both the last-mentioned Acts use the expression document of title to goods, and define it as including any bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods, and any other document used in the ordinary course of busi-

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ness as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented. In their Lordships' opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a "document showing title" or a "document of title" to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. In the present case it has been found as a fact by both the Courts below, and is not, and indeed cannot, be disputed before this Board that the railway receipts in question satisfy this test. It is therefore unnecessary to consider whether, apart from evidence as to the ordinary course of business, the effect of sections 4 and 137 of the Transfer of Property Act, No. 11 of 1900 would be conclusive on the point. It is clear that, even without the assistance of these sections, the receipts in question are documents showing title to goods within sections 102 and 108 and documents of title to goods within section 178 of the Indian Contract Act.

Returning to section 102, its effect may be stated as follows: First, so far as bills of lading are concerned, it enacts the rule of the common law by which a second buyer who obtained an assignment of the bill of lading obtained constructive delivery of the goods represented by the bill, so that the vendor's right of stoppage ceased. Secondly, so far as other documents of or showing title to the goods are concerned, it makes their assignment to a second buyer have the same effect as the assignment of a bill of lading. If, therefore, the respondents in these appeals had been second buyers and not pledgees of the goods represented by the receipts in question, the appellant's right of stoppage would have been displaced.

Passing now to section 103, it will be found to provide that where a bill of lading or other "instrument of title" to any goods is assigned by the buyer of such goods by way of pledge to secure an advance made specifically upon it in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit. If this section had used the expression "document showing title" or "document of title" instead of the expression "instrument of title," it is, in their Lordships' opinion, quite clear that it would have applied to the receipts in question, and that the vendor could not have stopped the goods in transit without pay-

ment or tender to the respective respondents of the amounts of their advances, which were admittedly made in good faith and specifically upon the security of the receipts in question. In other words, the section would have done, in the case of assignments by way of pledge, precisely what had been done in the previous section in the case of assignments upon a resale.

Great stress was naturally laid by the appellants on this difference of expression. They argued that "instruments of title" were a particular species of the genus "documents of title," and they attempted to define the species as consisting of documents which conferred title in the same manner and sense as title is conferred by a bill of lading. They supported this argument by the following considerations: First, they contended that the Indian Contract Act was primarily a consolidation Act, and therefore ought, in default of a clear expression to the contrary, to be read as embodying the law as existing when it was passed. Secondly, they urged the improbability of the Indian legislature having taken the lead in a legal reform for which this country had to wait until the passing of the English Factors' Act of 1877. Their Lordships cannot attach any weight to either consideration. The Indian Contract Act recites the expediency of defining and amending certain parts of the law relating to contracts. It is therefore an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. Again, their Lordships do not see any improbability in the Indian legislature having taken the lead in a legal reform. Such reform may have been long recognised as desirable without an opportunity occurring for its embodiment in a legislative enactment, and it may well be that the opportunity occurred sooner in India than in this country, where the calls for legislative action are so much more numerous.

It remains to consider the appellant's argument, so far as it is based on the use of the expression "instrument" instead of "document" of title. In the first place it is to be observed that "title" in both expressions can relate only to the right to receive delivery of the goods to which the instrument or document relates. It can have nothing to do with ownership. A bill of lading may in this sense be an instrument or document conferring title; but, if so, the same is true of all the other documents contained in the genus "document of title." The fact that a document confers title in this sense cannot therefore be used as the distinguishing mark of a particular species

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of the genus. The truth is that the only point in which a bill of lading differs from other "documents of title" is that its assignment, whether upon a resale or by way of pledge, operates as a constructive delivery of the goods to which it refers. The appellant's Counsel was unable to mention, and their Lordships are not aware of any other document with this peculiarity. In their Lordships' opinion the suggestion that the words "or other instrument of title" were inserted *per cautelam* in case there were any such instrument other than a bill of lading is far-fetched. Moreover, they cannot help thinking that the section, if intended to have the effect for which the appellant contends, would have been otherwise worded. Further, no reason can be suggested why, if (as is clearly the case) the legislature intended by section 102 to assimilate other documents of title to bills of lading for the purpose of determining the right of stoppage in transit in favour of a *bona fide* purchaser for value, it should not have by section 103 intended to do the same in favour of a *bona fide* pledgee for value. Under these circumstances little importance can be attached to the fact that one section employs the word "document" and the other the word "instrument," more especially as the use of the two expressions, document showing title and document of title, in the same sense shows that the draughtsman was not very careful in his use of language

For the foregoing reasons their Lordships are of opinion that these appeals fail, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

*Hughes & Son* :—Solicitors for the Appellant.

*T. L. Wilson & Co.* :—Solicitors for the Respondents.

M. P.

*Appeals dismissed.*

# SPECIAL BENCH.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge, Mr. Justice Chitty, Mr. Justice Fletcher, Mr. Justice Teunon, Mr. Justice Chaudhuri and Mr. Justice Walmsley.*

KUMAR PRAFULLA KRISHNA DEB AND OTHERS

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NOSIBANNESHA BIBI AND OTHERS.\*

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*Rent suit not exceeding 100 rupees in value—Decree, execution of—Order passed in execution proceedings by the District Judge, if appealable—Bengal Tenancy Act (VIII of 1885), Sec. 153.*

No appeal lies to the High Court against an order passed by a District Judge in execution of a decree passed in a suit instituted by a landlord for the recovery of rent, where the amount claimed in the suit did not exceed one hundred rupees, and the order did not decide any of the special questions referred to in section 153 of the Bengal Tenancy Act.

*Shyama Charan v. Debendra Nath* (1) approved.

Appeal by the Plaintiffs Decree-holders.

Plaintiffs obtained a decree against the defendants tenants for arrears of rent when they were ijaradars of Pergana Gangamandal. They applied for execution of the decree under the special provisions of the Bengal Tenancy Act after their rights as ijaradar landlords had ceased.

The Munsiff refused to execute the decree as a rent decree, inasmuch as the decree-holders had ceased to be landlords at the time of the execution of the decree; and on appeal the District Judge affirmed the decision of the first Court.

Against that order plaintiffs decree-holders preferred an appeal to the High Court.

The appeal at first came on for hearing before Mr. Justice N. R. Chatterjea and Mr. Justice Richardson, who referred the case to a Special Bench by the following

## ORDER OF REFERENCE.

The question raised in this appeal is whether a decree for rent obtained by a person who was the landlord when he obtained it, can enforce the decree against the holding in arrears under the special

\* Reference to a Special Bench in Appeal from Order, No. 174 of 1915, against the order of F. W. Ward Esq., District Judge of Tipperah, dated the 23rd January, 1915, affirming that of Babu J. C. Biswas, Munsiff at Comilla, dated the 31st August, 1914.

(1) (1900) I. L. R. 27 Calc. 484.



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provisions of the Bengal Tenancy Act, after he has ceased to be the landlord.

The appellants as Ijaradars brought a suit for arrears of rent and obtained a decree while they were Ijaradars. Subsequent to the decree however they ceased to be Ijaradars, and they applied for execution of the decree as a decree for rent by attachment and sale of the holding in arrears under the provisions of the Bengal Tenancy Act.

The Court of first instance held that the decree-holders cannot avail themselves of the provisions of sections 65 and 163 of the Bengal Tenancy Act and cannot proceed against the holding in arrears, and accordingly dismissed the application. That order was confirmed on appeal by the District Judge, and the decree-holders have appealed to this Court.

The question involved in the case was considered by a Full Bench of this Court, and the Full Bench was of opinion that if at the time when a suit for arrears of rent is instituted and a decree made, the plaintiff is still the landlord, the fact that he has subsequently sold his interest in the property does not prevent him from obtaining the benefit of section 65 of the Bengal Tenancy Act, and executing the decree against it. See *Khetra Pal Singh v. Kritarthamoyee Dasi* (1).

The question has also been recently considered in the case of *Forbes v. Maharaj Bahadur Singh* (2), by the Judicial Committee of the Privy Council.

The learned pleader for the appellants contends that the Full Bench decision has only been distinguished, and not over-ruled by the judgment of the Privy Council as held by the Courts below, and that the general observations made in the judgment must be taken as applicable to the facts of that case.

It is true that in that case the landlord had transferred his interest before he instituted the suit for arrears of rent, and their Lordships in referring to the Full Bench decision upon which this Court relied, pointed out that in the latter case, the landlord did not part with the property, and put an end to the relationship of landlord and tenant until after the decree in his suit for rent, and that this Court had fallen into an error in drawing an inference of law in support of their conclusion from a decision which was obviously based upon facts different from those with which they had to deal. But after pointing out that the decision of the Full Bench was inapplicable to the facts of that case, their Lordships proceeded to consider the

(1) (1906) I. L. R. 33 Calc. 566.

(2) (1914) I. L. R. 41 Calc. 926.

broad question "whether the special right created in favour of the landlord under section 65 can be claimed also by one who has parted with the property which gives this right and to which it is attached." After observing that section 65 is not happily worded, and gives no indication as to when the rent becomes a "first charge."—whether from the nature of the claim or after it has been ascertained and made the subject of a decree—and that "the section does not sufficiently indicate at whose instance the tenure or holding shall be liable to sale in execution of a decree for rent thereof, though from the reason of the thing it is obvious that it must be at the instance of the landlord," their Lordships considered the general scope of the Act as well as of the Chapter in which the section occurs. Referring to sections 65 and 66 of the Act their Lordships observed: "The two sections taken together cover practically the remedies provided by law for the landlord to recover arrears of rent. One section is the exact corollary of the other. The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced," that "a reference to section 148, clause (h) clearly shows that the right to apply for the execution of a decree for arrears was attached to the status of the decree-holder *qua* landlord."... "To acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interests vested in him. In other words, the right to bring the tenure or holding as the case may be to sale exists so long as the relationship of landlord and tenant exists," and came to the conclusion that "it is the existing landlord alone who can execute the decree: the ex-landlord is an outsider, and, whilst he can execute his decree against the debtor as a money-decree, he has no remedy against the tenure itself."

It will be seen therefore that the principle upon which the judgment of their Lordships proceeds, *viz.*, that in order to acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure or holding must have the landlord's interest vested in him; that the right to bring the tenure or holding to sale exists so long as the relationship of landlord and tenant exists, and that it is the existing landlord alone who can execute the decree, applies equally to a case where the landlord ceases to be landlord after he obtains a decree for arrears of rent, and before he seeks to

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enforce it against the tenure or holding, as to a case where he ceases to be landlord before he institutes his suit for rent. In either case there is no relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced.

The principle therefore upon which the decision of the Full Bench is based, is inconsistent with that upon which the judgment of the Judicial Committee in the case of *Forbes v. Maharaj Bahadur* (1), proceeds. That being so, we think that the question whether the decision of the Full Bench of this Court in the case of *Khetra Pal Singh v. Kritarthamoyee Dasi* (2), is still good law, should be decided by a Special Bench.

The case is accordingly placed before the Hon'ble the Chief Justice in order that it may be referred to a Special Bench under Part II, Chapter V, Rule VI of the Rules of the High Court Appellate Side.

When the case came before the Special Bench *Babu Jogendra Nath Mukherji* (with him *Babu Bankim Chandra Ghose*) for the Appellants contended that the decision of the Full Bench in *Khetra Pal v. Kritarthamoyee* (2) was still good law.

The Court pointed out that the suit for rent was valued at less than Rs. 100, and as the order now under appeal did not decide any of the special questions mentioned in section 153 of the Bengal Tenancy Act, the appeal was barred on the authority of the decision in *Shyama Charan v. Debendra Nath* (3).

*No one* for the Respondents.

The judgment of the Court was delivered by

July, 12.

**Sanderson, C. J.**—This is a matter which has been referred to us by Mr. Justice Naliniranjan Chatterjea and Mr. Justice Richardson before whom the appeal came.

In our opinion there was no right of appeal to those learned Judges for the reason that the order from which the appeal was filed was an order in a suit instituted by a landlord for the recovery of rent. The order was passed by a District Judge, and the amount claimed in the suit did not exceed one hundred rupees and the order did not decide any question which related to title to land or some interest in land as between parties having conflicting claims thereto or to any of the matters specifically referred to in section 153 of the

(1) (1914) I. L. R. 41 Calc. 926.

(2) (1906) I. L. R. 33 Calc. 566.

(3) (1900) I. L. R. 27 Calc. 484.

Bengal Tenancy Act. Under these circumstances we are of opinion that no appeal lay from the order of the District Judge to the High Court. If this matter had been brought to the notice of the two learned Judges, no doubt, they would not have sent this matter by way of reference to us. As a matter of fact only one of the parties was represented before them, and no doubt, through that, this point was not noticed by the two learned Judges.

The matter having been referred to us, it is now our duty in view of the opinion which we hold, to dismiss the appeal.

A. N. R. C.

*Appeal dismissed.*

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## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.*

LALIT MOHAN NANDY

v.

HARIDAS MUKHERJEE.\*

*Indian Contract Act (IX of 1872), Secs. 2, 76 and 178—"Goods," meaning of—"Goods", whether includes certificates of shares—Fraud, allegations of—Specific charge and strict proof, necessity of.*

Documents which are certificates of shares are neither "goods" nor "documents of title to goods" within the meaning of section 178 of the Indian Contract Act.

*R. D. Sethna v. The National Bank of India* (1) not followed.

*Per Sanderson C. J.* :—It is obvious from the phraseology of the section that the word "goods" was intended to refer to "goods" in the ordinary meaning of the word.

When the plaintiff sets up a charge of fraud against the defendant it is necessary for him to state in the plaint clearly and specifically what the fraud consists of, the nature of the fraud, and the particulars thereof which he says has been committed, and when he has pleaded that, it should be shown by strict proof that such fraud has been committed.

Appeal by Defendant No. 2.

Suit for recovery of money, and for a declaration that certain shares belonging to the Defendant No. 2 should be charged with

\*Appeal from Original Civil No. 79 of 1915, against the decision of Mr. Justice Imam, sitting on the Original Side, dated the 14th June, 1915.

(1) (1910) 12 Bom. L. R. 870.

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the repayment of the sum due to the plaintiff, and also for recovery of the said shares.

The material facts appear from the judgment of Mr. Justice Imam which is as follows :

**Imam J.**—The plaintiff in this suit sues the two defendants for the recovery of Rs. 2,500 lent and advanced to the first defendant Nikkamull Khetry on deposit of certain coal shares, for a declaration that the said shares are charged with the repayment of the debt, for recovery of the shares on the ground that they had been obtained by the first defendant from the plaintiff fraudulently, and for the sale of the said shares to satisfy the debt due to the plaintiff. The case of the plaintiff may be shortly stated here. On the 27th of March 1913 the plaintiff sold to the first defendant 200 Baraboni Coal shares for a sum of Rs. 3,000 and as Nikkamull the first defendant was not able to pay the entire consideration money, he paid a sum of Rs. 500 by cheque on that date and pledged 100 Equitable Coal shares for the balance, namely Rs. 2,500. The plaintiff was assured that the sum of Rs. 2,500 would soon be paid to him and therefore he allowed that money to remain with the defendant No. 1 without any interest. On the 2nd April 1913 the defendant No. 1 represented to the plaintiff that he had negotiated the sale of the 100 Equitable Coal shares, that had been pledged, with the second defendant Lalit Mohun Nundy who was prepared to pay the consideration for all the shares to the defendant No. 1 and believing this assurance to be true the plaintiff was induced to return the 100 Equitable Coal shares to Nikkamull, defendant No. 1, on receiving from him a cheque for Rs. 2,500 the amount that was due to the plaintiff. The plaintiff in his deposition in Court has stated that he was told that he would not have any occasion to present the cheque for encashment inasmuch as the money would be paid to him that evening and he would then have to return the cheque to Nikkamull. The plaintiff to satisfy himself as regards the truth of the assurance approached Lalit Mohun Nundy and learnt from him that the transaction was as it had been stated by Nikkamull. The plaintiff accordingly returned the 100 Equitable shares and received the cheque. The payment of Rs. 2,500 was however not made in the evening and the plaintiff had the cheque presented to the Bank for encashment the next day, *i.e.*, 3rd April 1913 and on its being dishonoured he instituted criminal proceedings against the first defendant. We are not concerned with the result of the criminal proceedings as the same does not affect the considerations of this case. Nikkamull on some allegations which is not necessary to relate here,

also instituted criminal proceedings against Lalit Mohun Nundy, the second defendant. The result of those criminal proceedings also does not touch this case in this Court. The first defendant has not entered appearance and the suit has been contested by the second defendant only. It is admitted that the first defendant on the 2nd April 1913 made over the 100 Equitable shares along with 1,100 other shares to the second defendant and the latter's case is that he received the 1,200 shares in part satisfaction of debt due to him from the first defendant and further the second defendant states that at no time did he promise either Nikkamull or the plaintiff to pay to Nikkamull either the whole or any portion of the consideration for the 1,200 shares. His contention is that he received the 100 Equitable shares as well as the 1,100 shares in the course of a *bona fide* transaction and that he was not liable either to Nikkamull or to the plaintiff for payment in cash any portion of the consideration of the 1,200 shares. There are only two issues in this case that require to be considered. (1) Whether Nikkamull had pledged the 100 shares to the plaintiff, and (2) whether the plaintiff has any right, title, or interest to or in the shares in suit against the defendant Lalit Mohun Nundy. The suit so far as the first defendant is concerned has to be decreed *ex parte*. The first issue does not appear to me to have been seriously contested by the second defendant. He has offered no evidence to disprove the statement of the plaintiff as regards the pledge of the 100 Equitable shares and the production by the plaintiff of the original cheque for Rs. 2,500 is a strong corroborative evidence on his side to support his case. The first issue, therefore, has to be decided in favour of the plaintiff. The principal issue really is the second issue and on the evidence I am disposed to hold in favour of the plaintiff on that issue also. It is admitted by the defendant No. 2 that on the 2nd April the 100 Equitable shares in question came into his possession from the defendant No. 1. It is further admitted by him that he made no cash payment for the shares in question to the defendant No. 1. The question then is whether Lalit Mohun Nundy received the shares in question on payment of any immediate consideration or in satisfaction of any existing debt or he received them in the manner alleged by the plaintiff. His case as further explained in his evidence is that out of the 1200 shares 450 shares formed part of 2750 shares that had been purchased for him by Nikkamull and 200 (of which 100 were the Equitable shares and 100 Baradhemu shares) were a part of the margin of 1300 shares that had been left by Lalit Mohun Nundy with Nikkamull on the transaction of the purchase of 2750 shares

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and the remaining 550 shares out of the 1200 were new shares that were handed over to Lalit Mohun Nundy by Nikkamull. Even on his own case Lalit Mohun Nundy shows that in exercise of some right the 100 shares in question had been kept by the Defendant 1, and even if they belonged to Lalit Mohun Nundy they were subject to some liability, the exact nature of which has not been explained in this case. A letter dated 3rd March 1913 has been produced in this case and both parties in support of their respective contentions rely on the contents of that document. That document shows the purchase of 2750 shares by Nikkamull for Lalit Mohun Nundy and the retention by him of 1300 shares on account of margin, it being apprehended by him that there would be a difference between the market value of 2750 shares and the price actually paid. So long as the value of 2750 shares remained unsettled, there is no denying that Nikkamull was entitled to retain as margin the 1300 shares. Lalit Mohun Nundy has produced a number of entries to show that a large sum was due to him from Nikkamull and that he was entitled to take the 1200 shares in part satisfaction of the debt due to him, and the accounts seem to me to be so confused that it is impossible for me on the strength of them to declare that Lalit Mohun Nundy has succeeded in showing that anything was due to him from Nikkamull, it may be that he was entitled to receive something, big or small, from Nikkamull, but the evidence before me is not satisfactory enough to induce me to hold in Lalit Mohun Nundy's favour. But even if it be granted that money was due to Lalit Mohun Nundy from Nikkamull, a transfer by Nikkamull of property belonging to another in order to satisfy a debt could confer no title on the transferee when the consideration for the transfer was not the payment of immediate cash but the mere satisfaction of an existing debt. It cannot be said that Lalit Mohun Nundy on account of the 100 shares parted with any money in favour of Nikkamull, what he did was that he had transactions with Nikkamull for a long time which resulted in a large balance in his favour and in order to satisfy the balance due to him he chose to accept from Nikkamull what was the property of a third person. In this view it seems to me that there was no transference of title though there was transference of physical possession. The plaintiff's case, however, is that Lalit Mohun Nundy had knowledge of the circumstances under which he the plaintiff parted with 100 shares in favour of Nikkamull. On this point the contentions of the parties are supported by their respective statements without corroboration from any witnesses, and I am left to decide the question on the credence

that I can give to the evidence of one party or the other. I give preference to the statement of the plaintiff as his manner in the witness-box impressed me more favourably than that of Lalit Mohun Nundy, but apart from this, it seems to me that the probabilities of the case lie equally with the plaintiff. On the 27th March he certainly did not consider Nikkamull worthy of so much confidence as to have been allowed to retain the plaintiff's Rupees 2500 on a mere verbal assurance to pay the same and the plaintiff had as security for his debt the 100 Equitable shares from him. Nothing happened during the 27th March and the 2nd April to alter the state of mind of the plaintiff and to engender in him any greater confidence in Nikkamull than he had on the 27th of March. On the 2nd April the plaintiff parted with the pledged shares in favour of Nikkamull on receiving from him a cheque for Rupees 2500 with no certainty as to its encashment. There is no doubt on the evidence that the plaintiff was assured that Nikkamull was negotiating with Lalit Mohun Nundy for the sale of some shares including the 100 shares in question, and as the parties transact their business in the same neighbourhood and have frequent opportunities of meeting each other, the plaintiff must have ascertained from Lalit Mohun Nundy as to the negotiations that Nikkamull was having with him. To part with the pledged shares on receipt of a mere cheque without any certainty of its encashment would have been an act of indiscretion on the part of the plaintiff which I do not believe he committed. It has been pointed out on behalf of Lalit Mohun Nundy that the case made by the plaintiff in this Court was not that that he had any talk with Lalit Mohun Nundy as regards the negotiations of Nikkamull with him but that the plaintiff was merely informed that Nikkamull in collusion with another had defrauded people of their shares by giving a number of cheques without having credit at the Bank for their encashment. The passage on which this argument is based deals with not merely the case of fraud practised on the plaintiff but also of frauds alleged to have been committed on others by Nikkamull. As regards the others the plaintiff could not but say that he had informations. As regards his not mentioning the name of Lalit Mohun Nundy initially in the proceedings in this Court, the explanation has been given that the plaintiff had been advised by his pleader not to start a case against Lalit Mohun Nundy. I am not concerned with the wisdom of the advice, but I believe the advice was so given, and I accept the statement of the plaintiff on this point. The result is that this suit is decreed not only against the defendant No. 1 but against the defendant No. 2 also. The

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plaintiff will get costs of this suit on scale No. 2 from the defendant No. 2 and on scale No. 1 from the defendant No. 1. The plaintiff will also get reserved costs, if any. I declare that the shares in question are charged with the payment of Rupees 2500. The plaintiff is entitled to interest on Rupees 2500 at 6 per cent. from the date of the decree from the defendant No. 1 only. The shares will be sold by the Registrar and the proceeds applied towards the payment of Rupees 2500, interest and costs, and the balance, if any, will be made over to Lalit Mohan Nundy. If the sale proceeds are not sufficient to satisfy the decretal amount, for the balance the plaintiff will have a personal decree against the defendant No. 1.

Against the decision defendant No. 2 appealed.

*Messrs. N. Sircar and I. B. Sen* for the Appellant.

*Messrs. A. P. Sen and B. K. Ghose* for the Respondent.

April, 14.

**Sanderson, C. J.**—In this case the action was brought by the plaintiff claiming the sum of Rs. 2500 and interest, and also for a declaration that the shares, which have been called in this case the "Equitable" shares, should be charged with the repayment of the said sum of Rs. 2500 and also for the recovery of the said shares. The action was brought against Nikkamull Khettry the first defendant who did not appear, and therefore the case proceeded, so far as he was concerned, *ex parte*. The other defendant was Lalit Mohan Nandy, and he is the defendant who has appealed against the decision of the learned Judge.

The learned Judge has directed that as far as this defendant (the second defendant) is concerned, the shares in question are charged with the repayment of Rs. 2500.

It is to be noticed in the first instance that the claim put forward by the plaintiff was that he had but advanced the said sum of Rs. 2500 to Nikkamull Khettry on the 27th of March 1913. It turns out upon the evidence being given that he had not lent or advanced Rs. 2500 in the ordinary sense of the words, but had sold 200 Baraboni shares to Nikkamull at Rs. 15 per share amounting to Rs. 3,000 and Nikkamull had given him a cheque for Rs. 500 which had been cashed, and, therefore, there remained a balance of the purchase-money, Rs. 2500 owing by Nikkamull to the plaintiff. In respect of that Nikkamull deposited with the plaintiff this certificate in respect of the 100 Equitable shares. The certificate is in the ordinary form, whereby it is certified that Mr. L. Rogers is "the registered proprietor of 100 of the abovementioned ordinary shares" and so on. The certificate was signed by somebody whose name

I cannot read, on behalf of Macneill & Co. who are the managing agents, and then apparently it was transferred in the name of a man called Mr. Macnaghten, and then it was transferred in *blank* and signed by the Attorney of Mr. Macnaghten. This certificate and blank transfer were deposited by Nikkamull with the plaintiff on the 27th of March 1913 as security for the payment of the Rs. 2500.

Now, it appears that the shares which were represented by this certificate had been deposited by the defendant Nandy with Nikkamull early in March. The learned Counsel for the respondent argued that there was nothing to show that the shares, the certificate for which the plaintiff held, were the same shares, as those which had been deposited with Nikkamull by the defendant Nandy. I do not think that point was raised in the trial, and I think there was evidence given that they were the identical shares. As I have said, these shares were deposited with Nikkamull early in March as margin in respect of certain speculations which were going on between Nikkamull and Nandy; and, the letter of the 3rd of March shows the terms under which Nikkamull held these particular shares. They are "In consideration that you (Nikkamull) hold in trust, the under-mentioned coal shares, with you on my (Lalit Mohan Nandy's) account, at the rates affixed thereto, I gave you and you received from me, some other coal shares as margin thereof, at the rate of Rs. 25 per cent. of the value of those shares which are expressly stated below as such. You shall not be able to dispose of, to sell or to deliver to any one else except me, any of these shares of mine, without my written instruction for the same." Then there is a provision in the end of the letter with reference to the margin being short to which the learned Counsel has referred.

Now, those being the conditions under which Nikkamull held the shares, it is urged that even though he had no authority to deal with those shares, still the plaintiff obtained a good title to them, because he did not know anything about the limit of Nikkamull's authority; and, inasmuch as he took them without notice and *bona fide* he is protected by section 178 of the Indian Contract Act, and it has been urged that this certificate comes within the meaning of that section. Section 178 runs as follows, "A person who is in possession of any goods, or of any bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawner is

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acting improperly: Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud." Reading those words without reference to any authorities, I have no doubt in my mind that the word "goods" does not include such a certificate as that now before us: nor does it include, speaking more generally, *shares*. I think it is obvious from the phraseology of thy section that it was intended to refer to "goods" in the ordinary meaning of the word. We know perfectly well what a bill of lading is,—it is document of title to goods shipped on board of a vessel, what a dock-warrant is,—which is a document of title relating to goods which are lying in a dock, and so the other documents which are referred to in the section, such as a warehouse-keeper's certificate, wharfinger's certificate, warrant or order for delivery of goods—all documents of title to goods, which are perfectly well-known not only in the legal world but also in the commercial world, and they cannot be extended by any stretch of language to such a document that is now before us. I therefore do not think that this certificate comes within the meaning of the word "goods." I am confirmed in that opinion by reference to the section (section 76) which defines the word "goods." In that section it means "Every kind of movable property." But it is expressly provided in that section that that meaning shall only be applied to the word "goods" as far as that chapter is concerned, namely Chapter VII. If it had been intended that that extended meaning should be given to the word "goods" in Chapter IX in which section 178 occurs, I think that the statute would have said so. Therefore, in my opinion section 178 does not apply to this case. What then is the position? We have the letter of the 3rd of March before us, in which it is distinctly stated that Nikkamull was not entitled to part with these shares without the express authority in writing of the other defendant Nandy. There was no evidence given to show that he had such authority. Therefore, the matter stands thus, that Nikkamull was holding these shares with no power to dispose of them and with no power to pledge them without express authority in writing. He did pledge them to the plaintiff, but he could not pass to the plaintiff any better title than he had himself.

At the time of the trial the shares had got back into the possession of the defendant Nandy. I do not understand how the plaintiff can make out any case against the defendant Nandy, unless he can prove a case of fraud against him. If he could have satisfied the Court that Nandy had been a party to a subterfuge or any

fraudulent transaction by means of which either by himself or together with Nikkamull he had deprived the plaintiff of the special property which he had in the certificate as pledge then two things would have resulted: It would have been right to infer, first of all, that Nandy had authorized Nikkamull to pledge the certificate, or, at all events, that he knew of the pledging of the certificate, and secondly, that he had been a party to the fraud by means of which the plaintiff was deprived of the pledge. But, in my opinion, the plaintiff has not succeeded in proving that there was any fraud on the part of Nandy by means of which the plaintiff was deprived of the possession of the certificate—I am not going into the evidence, which was referred to in detail in the course of the argument, because the matter was discussed fully, while the learned Counsel was arguing. But I should like to point out first of all that the plaint does not make any such charge of fraud as is now attempted to be made against Nandy, viz: that he, Nandy, fraudulently represented that he had undertaken to purchase the shares from Nikkamull and that he would provide the money in the evening. It is quite true that in the pleadings the plaintiff alleged that Nandy and Nikkamull have acted in collusion with regard to certain police proceedings for the purpose of getting the shares out of the custody of the Police Court and it is quite true that he also stated that the defendant Nandy was aware of the fraud which the plaintiff alleged Nikkamull had perpetrated upon him, but he did not suggest in his pleadings that it was by reason of fraudulent representation on the part of Nandy that the plaintiff was induced to part with those shares. In my opinion, it is necessary, when the plaintiff is going to set up a charge of fraud against the defendant, to state in the plaint, clearly and specifically what the fraud consists of, the nature of the fraud, and the particulars thereof which he says has been committed, and, when he has pleaded that, it should be shown by strict proof that such fraud has in fact been committed. In this case not only did he not set up the fraud which is now alleged, but no sufficient evidence was given at the trial to support the allegation now made.

For this reason I think the learned Judge's judgment cannot be supported. He has not found a charge of fraud against the defendant Nandy, but has dealt with this matter, looking at the case from the point of view of title, and his judgment cannot be upheld.

Therefore, this appeal is allowed with costs and the suit as against the appellant defendant Lalit Mohan Nandy dismissed with costs.

**Woodroffe, J.**—The learned Judge has not I think dealt with this case from the right point of view.

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For the purpose of this judgment I will assume that there was a debt owing by Nikkamull Khetry to the plaintiff, that that debt was secured by a pledge of the shares in question, that by fraud Nikkamull Khetry got back the shares without paying the debt and that he subsequently made them over to the defendant Lalit Mohun Nandy. Now, if, as the plaintiff alleges, Lalit Mohun Nandy was a party to the fraud set up, then the plaintiff would succeed. The learned Judge has not found this ; and the fraud which is by no means clearly set forth has not been made out.

We must proceed then on the assumption that the fraud is not proved, and we have to determine who is entitled to these shares as between the plaintiff and defendant Nandy who, on the hypothesis I have stated, is assumed to be an honest holder of them.

The first question which is raised is whether section 178 of the Contract Act applies to the case. I am not prepared without further consideration to say that it does. The learned Judge who expressed his opinion in *R. D. Sethna v. The National Bank of India* (1), did not himself do so without doubt. But it is unnecessary for me to determine this question, because, assuming for the sake of argument that section 178 does apply that section makes no difference to the findings at which I have arrived ; for, if that section be applied to the plaintiff it must equally be applicable to the case of Nandy defendant. We have then this case. The shares clearly belonged originally to the defendant Nandy and were made over by him to Nikkamull Khetry as security for margin of shares carried by him on the express terms that he, Nikkamull Khetry, would not make them over to a third person. Notwithstanding, and I will assume in fraud of Nandy, Khetry pledged them on his own account to the plaintiff. Let me assume that the plaintiff having no knowledge of the true facts took a valid pledge of the shares. Then Nikkamull Khetry, we will assume, in fraud of the plaintiff got back the shares without paying his debts and made them over to their lawful owner. Defendant Nandy took them without notice of any thing which had previously happened. It is conceded that if Nandy had got them back on payment of cash his title would have prevailed against the plaintiff. But it is said that it does not because, Nandy, it is alleged, did not pay cash, but took them in payment of an antecedent debt due by Khetry to him on general account. It is not clear what the transaction was, but it is certain, whatever it was, that Nandy was getting back his own property. He was not, as the learned Judge, has found, accepting property of a third person.

(1) (1910) 12 Bom. L. R. 870.

Mr. Sen says that Nandy was not entitled to get the property back except in terms of the letter, Exhibit (1A). But assuming that he did not receive it in accordance with such terms, that is no affair of the plaintiff, but a matter between the defendants. It was open to Nikkamull to release the shares to their owner in any way he liked provided that the transaction was not, as I assume, fraudulent. The result is that whether the plaintiff had a valid pledge or not the shares are now in the possession of their original rightful owner unaffected by notice of any fraud and he is entitled to retain the shares against the plaintiff. The relief, to which the plaintiff is in such circumstances entitled, is against the defendant Nikkamull Khetry who is said to have defrauded him. He had got this relief in the decree which the learned Judge has made. The suit against the second defendant should in my opinion be dismissed.

As for the argument that the evidence discloses a guarantee by the second defendant that the cheque would be honoured, that case was not made in the plaint or in the issues. There was no necessity in such a case to plead fraud. The case would have been a simple one of the receipt of a cheque in payment of a debt on the guarantee of a third party that he would be responsible if the cheque was not honoured.

Moreover as Mr. Sircar argued this story is quite inconsistent with what happened in the Police Court proceedings in which a charge of fraud was made against defendant Nikkamull, in which no such charge was preferred against defendant Lalit Mohan Nandy. If, as Mr. Sircar pointed out, the evidence given by the plaintiff be true then it would go to exculpate the first defendant who said "what shall I do, Lalit Mohan Nandy did not pay me any money" when the plaintiff made a complaint to him that his cheque has been dishonoured. On the contrary if the evidence is true that Nandy was present then a case might have been put forward (with what success I need not consider) against him.

The appeal in my opinion succeeds and should be decreed with costs. The suit as against the appealing defendant should be dismissed with costs.

**Mookerjee J. :—**I agree that this appeal must be allowed; notwithstanding the earnest endeavour made by Mr. Sen to support the decree which has been made in favour of the respondent by Mr. Justice Imam.

The cardinal question in controversy is, whether the plaintiff respondent has acquired a valid lien on the shares in dispute.

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These shares were owned by the appellant Lalit Mohun Nundy, who on the 3rd March 1912, deposited them with Nikkamull Khetry as margin in connection with certain speculative transactions. The terms of the agreement of deposit are before the Court ; and show conclusively that the bailee had no authority to deal with the shares. It is stated expressly that "the bailee will not be able to dispose of, to sell or to deliver to any one else, except the bailor, any of these shares without any written instruction for the same." Notwithstanding this clear instruction, the bailee dealt with the shares and pledged them with the plaintiff as security for a loan. *Prima facie*, the plaintiff did not acquire a valid title to the shares on the basis of this transaction, for the pledger could not confer on the plaintiff a title better than what he himself possessed. The plaintiff is consequently driven to rely on section 178 of the Indian Contract Act which deals with cases of pledge by possessors of goods or documentary titles to goods, and lays down that a person who is in possession of any goods or documents of title to goods, may make a valid pledge of such goods or documents, provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawner is acting improperly. This section cannot avail the respondent, unless he is able to establish that the documents, which are certificates of shares, were either goods or documents of title to goods. It has not been and cannot be contended that they were documents of title to goods ; but, on the authority of the decision of the Bombay High Court in *R. D. Sethna v. The National Bank of India* (1), the argument has been advanced that these certificates were goods within the meaning of section 178 of the Indian Contract Act. I am not prepared to accept this contention as well founded. Reference was made to the very comprehensive definition of the term 'goods' given in section 76 of the Indian Contract Act which lays down that in Chapter VII the word 'goods' means and includes every kind of movable property. As section 178 is in Chapter IX, it would plainly be not right to extend the definition given in section 76 to the term 'goods' as used in sections not comprised in Chapter VII. If the legislature had intended that the definition given in section 76 should have a wider application, we would have expected to find it in section 2 which is the interpretation clause of the statute. Our attention has also been drawn to section 108, the provisions whereof are similar to those of section 178. But this is of no assistance to the respondent, because, section 108 finds a place in

Chapter VII whereas section 178 finds a place in Chapter IX. Notwithstanding the decision of the Bombay High Court, I must consequently hold that the documents now before us are not 'goods' within the meaning of section 178.

If then section 178 does not apply, as I hold it does not, what is the position of the plaintiff? The defendant, at the time of the institution of the suit was in possession of the disputed shares. What had happened was that Nikkamull had obtained the shares from the plaintiff in return for a cheque which was later on dishonoured. The shares were subsequently made over by Nikkamull to the defendant Nandy, the rightful owner, who is thus now in possession of the shares. Can the shares be pursued in his hand by the plaintiff? The answer must be in the negative. The plaintiff might have a remedy against the appellant if he could establish that the latter obtained possession of the shares by means of fraud. But no fraud was specifically charged as against him in the plaint; though fraud was charged against Nikkamull Khetry. In these circumstances, the elementary rule applies that fraud must be specifically alleged in the plaint in order that the plaintiff may succeed on the strength thereof against the defendant and the fraud so specifically alleged must be established beyond doubt. The appellant cannot properly be charged with fraud at this stage of the proceedings. But even if we concede for a moment that the plaintiff respondent is entitled to succeed on the ground of fraud now brought against the appellant, what is the position? What is the fraud now charged? As I read his deposition, the allegation is that on the 2nd April the appellant made a false representation to the respondent that he had agreed to purchase shares for cash and would pay in the evening, fraudulently implying thereby, that if, in the circumstances, the plaintiff accepted a cheque from Nikkamull Khetry, that cheque would be honoured. The statement made by the plaintiff, however, in his deposition does not bear out this allegation of fraud, and it must be considerably amplified and supplemented in order that this case may be supported. But the respondent is in a position of further embarrassment, if we remember that this specific case of fraud was not put to the appellant when he went into the witness-box. The substance of the matter then is that there was no specific charge of fraud against the appellant, in the plaint, the fraud which is now alleged is not established by the deposition of the plaintiff, and was never put to the defendant when he was cross-examined. In these circumstances, it would clearly be wrong to allow the plaintiff to succeed against the appellant on the ground of fraud.

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I agree that this appeal must be allowed and the suit as against the appellant, dismissed with costs.

*Mr. T. B. Roy* :—Attorney for the Appellant.

*Mr. A. C. Ghose* :—Attorney for the Respondent.

A. N. R. C.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice and  
Mr. Justice Holmwood.*

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July, 29.

RASHBIHARI DAS AND OTHERS

v.

KUNJABIHARI PATRA AND OTHERS.\*

*Limitation Act (IX of 1908), Arts. 116, 120 and 132—Mortgage—Loan of Paddy.*

<sup>1</sup>Where a loan was taken of paddy and was promised to be returned with interest in paddy, a suit to realize the value of the paddy due by sale of immovable properties given by way of security for the repayment of the loan is not governed by Art. 132 of the Limitation Act ; either Art. 116 or Art. 120 applies. The suit cannot be treated as a suit to enforce payment of money charged upon immovable property.

Suit on a mortgage.

Appeal by the purchasers defendants.

On the 30th May, 1896, one Kartick Baguli took a loan from one Dharanidhar Patra of 9½ *maps* of 'paddy and agreed to pay *bari* (interest in kind) at the rate of two *salis* per *map* per annum and to repay the principal quantity of paddy on the 11th February, 1899. The borrower at the same time executed and registered a mortgage bond to secure the repayment of the loan. The bond provided that the interest would be paid in the month of Magh every year and that in default thereof the interest would be regarded as principal and interest thereon would run at the aforesaid rate until realization. After the deaths of the mortgagor and the mortgagee, representatives in interest of the mortgagee instituted a suit on the 11th February, 1911, against the representatives of the mortgagor for recovery of

\* Appeal from Appellate Decree No. 1085 of 1913 against the decree of L. Palit Esq., District Judge of Zillah Bankura, dated the 7th of February, 1913, modifying the decree of Babu Kunjabihari Ballav, Munsiff of Khatra, dated the 13th of January, 1912.

Rs. 999 as the value of the paddy due, by sale of the mortgage properties. The defendants did not enter appearance ; but on the 21st April, 1911, the representatives of one Lakminarain Das were upon their own application added as defendants on the allegation that the mortgage property had been purchased by Lakminarain on the 6th January, 1902. These added defendants raised the question of limitation and contended that the suit was barred as against them and the property in their hands, as they had become parties to the suit more than 12 years after the due date. The Court of first instance gave effect to this contention under section 22 of the Limitation Act and dismissed the suit. On appeal the District Judge reversed the decision ; he held that the suit was barred as against the added defendants yet he directed that the mortgage properties be sold for the satisfaction of the dues of the plaintiffs. The added defendants appealed to the High Court.

*Babus Bipinbihari Ghosh* and *Bijaykumar Bhattacharyya* for the Appellants.

*Babus Dwarkanath Chakrabarti* and *Nakuleswar Mookerjee* for the Respondents.

The judgment of the Court was delivered by

**Jenkins, C. J.**—This is not a suit to enforce payment of money charged upon immovable property and so Article 132 cannot apply. Whether it be Article 116 or 120 that governs makes no difference. In our opinion the suit would be barred with a very large margin to the lead. At the same time we are unable to subscribe to the law expounded by the learned District Judge. In disposing of the case on the ground that article 132 is not applicable we must not be taken as accepting that the learned Judge's view was otherwise correct. The decree of the lower appellate Court is set aside and that of the Munsiff restored with costs throughout.

S. C. R. C.

*Appeal allowed.*

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Rashbihari

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Kunjabihari.

July, 29.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir  
Asutosh Mookerjee, Knight, Judge.*

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May, 2.

SURENDRA NATH ROY AND OTHERS

v.

DWARKA NATH CHUCKERBUTTY AND OTHERS.\*

*Civil Procedure Code (Act V of 1908), Sec. 110, para. 2—Property in dispute, value of—Valuation, how to be determined—Valuation in the plaint, whether estops the plaintiff—Admission, if rebuttable.*

Under the second paragraph of section 110 of the Code of Civil Procedure, the date of the decree or final order from which the appeal to His Majesty in Council is to be made is the material date, and as such the valuation of the property at the date of the institution of the suit is immaterial.

The fact that the plaintiff valued his suit in the Court of the first instance at a sum less than Rs. 10,000, and paid Court-fees accordingly, does not debar him from raising the point that the property, which is in dispute in the appeal to his Majesty in Council is in fact valued at more than that sum. At the most it could only be taken as an admission, and it was one that might be rebutted by subsequent evidence.

Application for leave to appeal to His Majesty in Council.

Plaintiffs landlords brought a suit in the Court of the 1st Munsiff at Alipore, District 24-Perganas, against the defendant for ejectment from a plot of residential land situate at No. 10-1 Baishnabpara 1st Lane (now known as Burdwan Lane) measuring about 1 bigha and 18 cottas held at a rental of Rs. 4-4-3p. Plaintiff's case was that the defendants were only *ticca* tenants, and notice was served on them for vacating the land in dispute, and as they did not do so the present suit was brought. Defendants contended *inter alia* that they were *mocurrari mourasi* tenants, and as such were not liable to be ejected. The learned Munsiff found in favour of the plaintiffs. On appeal the learned District Judge reversed the decision of the first Court. An appeal from appellate decree was preferred to the High Court, which was dismissed under O. 41, r. 11 of the Code of Civil Procedure.

The plaintiffs then made an application to the High Court for leave to appeal to His Majesty in Council against the decision of the High Court.

\* Privy Council Appeal, No. 18 of 1915, against the decision of a Division Bench of the High Court, dated the 14th December, 1914, in Appeal from Appellate Decree, No. 2711 of 1914, against the decree of H. P. Duval Esq., District Judge of 24-Pergannas, dated the 18th June, 1914, reversing that of Babu Purna Chandra Basu, Munsiff, Alipore, dated the 7th July, 1913.

A dispute then arose as to the valuation of the land in dispute ; the appellants stated that on the basis of Rs. 350 to Rs. 500, a cotta, the valuation would be Rs. 13,300, and the respondents stated that the value of the land was only Rs. 3,300. Accordingly, an enquiry was directed to be made under Order XLV, r. 5 of the Code by the Munsiff, 1st Court, Alipore, as to the value of the subject-matter in dispute, and the report together with the evidence having been submitted by him to the High Court, the case was heard by Sanderson C.J. and Mookerjee J.

*Babus Dwarka Nath Chuckerbutty and Kali Kinkar Chuckerbutty*, for the Appellants Petitioners.

*Babu Jyotish Chandra Hazra*, for the Opposite Party.

The following judgments were delivered :

**Sanderson C. J.**—This is an application by the plaintiffs for leave to Appeal to His Majesty in Council. An action was brought by the plaintiffs against the defendants claiming ejectment from certain property. The plaintiffs allege that the defendants are tenants-at-will only while the defendants allege that they had a permanent tenancy which had been granted by the plaintiffs' predecessor to the defendants' predecessor, and the Munsiff before whom the action was brought gave judgment for the plaintiffs and came to the conclusion that the tenancy was a terminable one on notice. Then there was an appeal to the District Judge who accepted the findings of fact arrived at by the Munsiff but came to the conclusion that the tenancy was a permanent one and gave judgment for the Defendants. Thereupon the plaintiffs applied to a Division Bench of this Court for permission that the appeal should be admitted under Order XLI, rule 11 of the Code of Civil Procedure. That application was rejected on the 14th December, 1914. The applicant now asks this Court for leave to appeal to His Majesty in Council against the order of this Court dismissing his application under Order XLI, rule 11.

The first question raised by the Vakil for the Opposite Party is under section 110. He says that under that section the subject matter of the suit must be of the value of Rs. 10,000 at the date of the institution of the suit, and also that it must be of that value at the date of the decree from which the Appeal to His Majesty in Council is desired. Now I think that without deciding whether this case does come within the first paragraph of section 110 of the Code of Civil Procedure as to which there may be some difficulty inasmuch as there was no evidence as to the value of the subject

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matter while this case was in the court of first instance, I think this matter does come within the second paragraph of section 110 of the Code of Civil Procedure seeing that the decree or final order involves directly or indirectly some claim or question to or respecting property of the value of Rs. 10,000. The decree or final order must be the decree or final order from which the appeal is made, that is, the decree of the High Court of December 1914 and when one remembers that the question which it is desired to argue is this, whether upon certain given facts or data the tenancy is to be regarded as one at will or one of a permanent nature, it seems to me that this is a matter in which a substantial question of law is involved.

The other question which I have to consider is whether the property is of the value of Rs. 10,000 or upwards. We have the report which was made at the instance of the High Court, dated January 1916, which is to the effect that the property was worth Rs. 11,400. The learned Vakil says that this is all very well. The property may have been worth Rs. 11,000 in 1916 but it does not follow that it was worth that amount at the date of the institution of the suit. I do not think myself that that is the material date. I think the material date is the date of the decree from which the appeal to the Privy Council is to be made and that date is admittedly December 1914. It may be said that even if that was the value of the property in January 1916, it does not follow that the value was the same in December 1914 inasmuch as according to the report the property has gone up by leaps and bounds within the last few years. When we look at the report especially at the materials upon which the Munsiff made his report we find from the evidence given by the valuer, that the property was valued at Rs. 300 a cotta. He corroborated his opinion by referring to two conveyances of the land in the immediate neighbourhood which are dated the 4th and 9th April 1914, and there seems to have been no other transaction subsequent to the dates on which the valuer based his opinion and consequently I think that the value arrived at by Mr. Warwick at Rs. 300 per cotta may be taken to have been the value of the property in 1914. Therefore the value of the property was above the requisite amount in December 1914, and for this reason the case comes within the second paragraph of section 110 of the Code of Civil Procedure.

The property was at the date of the decree more than Rs. 10,000 but the learned Vakil went on to argue that the plaintiff could not now assert that the property was worth Rs. 10,000 inasmuch as he

brought his suit in the Munsiff's Court and he paid court-fees on the annual rental of Rs. 4-4.

Speaking for myself I do not think that the plaintiff is debarred from raising the point that the property which is in dispute is in fact of the value of Rs. 11,400. It may very well be that at the time he instituted the suit he thought if he could, according to the Rules of the Court, bring his case within the jurisdiction of the Munsiff he would be well advised to do so. The point taken by the learned vakil may have been a good one, for objecting to the jurisdiction of Munsiff in the Court of first instance. At the most, it would only be taken as an admission and it was one that might be rebutted by subsequent evidence that it was worth more than Rs. 10,000.

For these reasons I think the application should be allowed and leave to appeal to His Majesty in Council granted.

**Mookerjee J.**—I agree, that the petitioners have established that their application for leave to appeal to His Majesty in Council fulfils the requirements of section 110 of the Code of Civil Procedure. The petitioners rely upon the second paragraph of the section which deals with cases where the decree involves, directly or indirectly, some claim or question to or respecting property of the amount or value of Rs. 10,000. They do not rely upon the first clause, which refers to cases where the amount or value of the subject matter of the suit in the Court of first instance is Rs. 10,000 or upwards, and the amount or value of the subject matter in dispute on appeal to His Majesty in Council is also the same sum or upwards. They cannot take advantage of the first clause inasmuch as there are no materials on the record to show that the value of the subject matter of the suit in the Court of first instance, or in the Court of Appeal, was of the prescribed amount. The trial Court, however, has reported that the value of the property affected by the decree is over Rupees 10,000. The finding of that Court is somewhat loosely expressed and it may be plausibly contended that the value as determined by that Court refers to the value in 1916. But the evidence on which the finding is based relates to transactions which took place in 1914, and, consequently, we may legitimately hold that the trial Court has found that the value of the property affected by the decree was above Rs. 10,000, in 1914. The suit which was instituted in 1912, was decreed by the Court of first instance on the 7th July 1913. On appeal to the District Judge, the suit was dismissed by him on the 18th June 1914. A second appeal to this Court, was dismissed under

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Order XLI, rule 11 on the 15th December, 1914. This dismissal operates in law, as an affirmance of the decree of the District Judge.

The petitioners now pray for leave to appeal to His Majesty in Council against the decree of this Court, dated the 15th December 1914, and the question consequently arises, with reference to what point of time is the value of the property affected by the decree to be determined for the purposes of section 110. In my opinion, it is plain that when section 110 provides that the decree must involve, directly or indirectly, some claim or question to or respecting property of the value of Rs. 10,000 or upwards, the intention of the legislature is that the value is to be determined with reference to the date of the decree under appeal. This view is supported by the decision of the Judicial Committee in *Allan v. Pratt* (1), where the Earl of Selborne quotes with approval the observation of Lord Chelmsford in *Macfarlane v. Leclaire* (2), "that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it and who seeks to relieve himself from it by appeal; if there is to be a limit of value at all, that seems evidently the right principle on which to measure it. The proper measure of value for determining the question of the right of appeal, is the value of the judgment. It is on this principle that the Judicial Committee in *Mohideen v. Pitchay* (3), held that in determining the value for the purposes of an appeal, the mesne profits upto the date of the decree are to be taken into account, and this view was followed by this Court in the case of *Dalgleish v. Damodar Narayan* (4). The same principle was adopted by the Judicial Committee, when in the cases for *Bank of New South Wales v. Owston* (5); *Goorooopersad v. Juggut Chunder* (6); *Moti Chand v. Ganga Pershad* (7), they ruled that interest upto the date of judgment is to be taken into account in determining whether the appealable value has been reached or not: *Nand Kishore v. Ram Gulam* (8). In my opinion, it is perfectly plain that under section 110 the point of time to be considered is the date of the judgment under appeal. If this principle is adopted, there is no room for controversy that in the case before us, the decree against which leave to appeal is sought does affect property of the value of Rs. 10,000 and upwards.

The only other question is, whether the decree appealed against, which is in affirmance of the decree of the Court immediately below,

(1) (1888) 13 App. Cas. 780.

(3) (1893) App. Cas. 193.

(5) (1879) 4 App. Cas. 270.

(7) (1901) L. R. 29 I. A. 40.

(2) (1882) 15 Moo. P. C. C. 181.

(4) (1906) I. L. R. 33 Calc. 1286.

(6) (1860) 8 M. I. A. 166 (169).

(8) (1912) I. L. R. 39 Calc. 1037.

involves a substantial question of law. As already explained by the Chief Justice, the question in controversy relates to the nature of the tenancy held by the defendants under the plaintiffs; was that a permanent tenancy or a tenancy terminable by notice to quit. The District Judge has in effect accepted the findings of the Court of first instance, but he has drawn from those findings a conclusion precisely contrary to that drawn by the trial Court. The question thus is, what inference may legitimately be drawn from the fact found and this clearly is a mixed question of fact and law as appears from a long line of cases reviewed in *Maharam v. Telamuddin* (1) and *Raja Makund Deb v. Gopi Nath* (2). In my opinion, there is no room for doubt that the appeal does involve a substantial question of law, and that a certificate must consequently issue that the case fulfils the statutory requirements both as regards nature and value.

A. N. R. C.

*Leave granted.*

(1) (1911) 15 C. L. J. 220. \*

(2) (1914) 21 C. L. J. 45.

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*Mookerjee, J.**Before Mr. Justice D. Chatterjee and Mr. Justice Newbould.*

GANGA CHARAN DAS AND ANOTHER

v.

AKHIL CHANDRA SHAHA AND OTHERS.\*

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*May, 24, 25 and  
June, 23.*

*Limitation Act (IX of 1908) Sec. 14, cl. 2, explanations 1 and 2—Civil Procedure Code (V of 1908), O. VII, r. 10—Return of plaint—Permission to refile in proper Court—Order allowing further time—Court, power of—Suit, filing of—Last day—Plaintiff, risk of—Prosecution of a suit in a Court—Return of plaint, termination on.*

The plaintiffs attached certain properties in execution of a decree against one of the defendants. Some of the other defendants also claimed the same properties and their claims were allowed on the 3rd of September, 1908. The plaintiffs brought this suit on the 2nd of September, 1909 in the Court of the Munsiff who had no jurisdiction to try the suit. On the 23rd of June, 1910 the Munsiff ordered the plaint to be returned for presentation in the proper Court and directed the plaintiffs to pay costs. The plaint was returned on the 27th of June, 1910 with the permission to refile it in the proper court within five days and an order fixing

\* Appeal from Appellate Decree No. 776 of 1913 against the decision of G. B. Mumford, Esq., Additional District Judge of Dacca, dated the 9th October 1912, confirming the decision of Babu Sarat Chandra Sen, Subordinate Judge at Dacca, dated the 25th July, 1911.



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the amount of costs was recorded on the 30th June. The suit was refiled on the 1st of July 1910 :

*Held*, that the order allowing further time must be considered as a nullity.

*Held also*, that a plaintiff who files his suit on the very last date available to him under the law of Limitation, takes the risk and the law does not make any provision for extension of time except in cases coming under clause 2 of Sec. 14 of the Limitation Act.

*Held further*, that the return of the plaint terminates the connection of the Court with the plaint which it cannot entertain and though the costs were calculated later, the plaintiffs were not prosecuting the suit in the Court of the Munsiff after that Court had returned the plaint and the explanations to Sec. 14 of the Limitation Act cannot be read as extending the time excluded, beyond the time when the plaintiff may be said to have been prosecuting their suit.

Appeal by the Plaintiffs.

Suit for declaration of title and possession.

*Babu Romesh Chandra Sen* for the Appellants.

*Dr. Sarat Chandra Bysack, Moulvi A. K. Fazlul Huq, Babus Upendra Lal Roy, Bipin Chandra Bose, Sarat Chandra Datta, Prakash Chandra Pakrasi and Ramendramohan Majumdar* for the Respondents.

C. A. V.

The judgment of the Court was delivered by

**D. Chatterjee, J.**—The plaintiffs attached certain properties in execution of a decree against defendant No. 9. Some of the other defendants claimed the same and were successful. The claims were allowed on the 3rd of September 1908 and the plaintiffs brought this suit on the 2nd of September 1909 in the Court of the Munsiff of Dacca. The defendants objected to the valuation of the suit and on the 23rd of June 1910 the learned Munsiff held that the suit was undervalued and ordered the plaint to be returned and directed the plaintiffs to pay costs to the contending defendants. The plaint was accordingly returned on the 27th of June. The costs payable by the plaintiffs to the contending defendants were subsequently calculated in the office and on the 30th June an order fixing the amount at Rs. 25 was recorded in the order-sheet. When returning the plaint on the 27th of June the learned Munsiff directed that the plaint might be refiled in the proper court within 5 days. The plaint was actually refiled on the 1st of July 1910 within the 5 days so allowed. It is contended however that the suit is barred by limitation as the learned Munsiff had no authority to grant the additional 5 days. The plaintiffs contend first that the Munsiff was right in granting time and secondly that the proceedings in the Munsiff's Court ended on the 30th of June when the order assessing

unc. 23.

costs was made and in either case they are within time. Explanation 1 to section 14 of the Limitation Act lays down that in excluding the time during which a former suit was pending the day on which the suit was instituted and the day on which the proceedings therein ended shall both be counted. No further time is allowed as in clause 2 for going from one Court to another. There is no other provision in the Limitation Act or in the Civil Procedure Code for allowing further time and the order allowing further time must be considered as a nullity, see *Haridas Roy v. Sarat Chandra Dey* (1). This view of the matter might cause hardship in some cases as the plaintiff might require time to secure further costs or to reach the new Court. But a plaintiff who files his suit on the very last date available to him under the law of Limitation, takes the risk and the law does not make any provision for such time except in cases coming under clause 2 of section 14. But then if the proceedings in the suit in the Munsiff's Court ended on the 30th June the plaintiffs are still within time. Order VII, rule 10, Civil Procedure Code provides that on returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it and a brief statement of the reasons for returning it.

The return of the plaint with these particulars therefore seems to terminate the connection of the Court with the plaint which it cannot entertain. So far as this case is concerned the costs were ordered to be paid by the order of the 23rd of June so that no further judicial act remained to be done. The costs were calculated later but the plaintiffs had nothing to do with that; they were not prosecuting the suit in the Court of the Munsiff after that Court returned the plaint and the explanation cannot be read as extending the time excluded beyond the time when the plaintiff may be said to have been prosecuting their suit. In this view of this matter the order for costs passed on the 30th June cannot be taken into consideration. The suit is therefore barred by limitation and it is not necessary to consider any other question. The appeal is dismissed with one set of costs to be divided among three sets of respondents.

S. C. R. C.

*Appeal dismissed with costs.*

(1) (1913) 17 C. W. N. 515.

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*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr.  
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GUNENDRA MOHAN GHOSH AND OTHERS

*v.*

CORPORATION OF CALCUTTA.\*

*House drain—Calcutta Municipal Act (III B.C. of 1899), Sec. 286—Drain vesting in the Corporation, effect of.*

The fact that the drain is a house drain, made by the owner of the adjoining premises for the outlet of water therefrom, does not exclude it from the operation of section 286 of the Calcutta Municipal Act.

When a road or a drain vests in a Municipality, the effect is not to confer the full proprietary right in the soil itself covered by the road or the drain on the Commissioners.

*Chairman of Naihati Municipality v. Kisorilal* (1) and other cases referred to.

The property of the local authority concerned does not extend further than is necessary for the maintenance and user of the highway as a highway; subject to this qualification, the original owner's rights and property remain, and, if the highway ceases to be a highway, the owner becomes entitled to full and unabridged rights of ownership in the property.

Appeal by the Plaintiffs.

Suit for declaration of title to land and for a perpetual injunction to restrain the defendant Corporation from interference with them in the exercise of their rights as proprietors.

The material facts and arguments appear from the judgment.

*Babu Bhudeb Chandra Roy* for the Appellant.

*Babu Debendra Chandra Mullick* for the Respondent.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee, J.**—This is an appeal by the plaintiffs in a suit for declaration of title to land and for a perpetual injunction to restrain the defendant Corporation from interference with them in the exercise of their rights as proprietors. The case for the plaintiffs is that the disputed land appertains to their premises 13/3 Circular Garden Reach Road, that their predecessor constructed a drain thereon for the outlet of water from the premises, and that on the

\*Appeal from Appellate Decree No. 184 of 1912, against the decision of Babu Bhagabati Charan Mitra, Subordinate Judge of 24-Perganas, dated the 20th September, 1911, modifying that of Babu Amrita Lal Palit, Munsiff of Alipore, dated the 27th July, 1907.

(1) (1886) I. L. R. 13 Calc. 38.

29th May, 1906, two of the officers of the Corporation had caused the land to be included within the boundaries of the adjoining street. The plaintiffs assert that such unlawful action on the part of the Corporation had rendered it necessary for them to obtain a declaration of their title and injunction so as to secure them from future interference. The defendant Corporation resisted the claim on the ground that the land was not the property of the plaintiffs, that the drain was a part and parcel of the public street, and that it was in any event a public street within the meaning of section 336 of Act III of 1899 B. C. and had become vested in the Corporation and was their property. The Court of first instance found in favour of the plaintiffs on the question of title, and granted them a perpetual injunction. On appeal the Subordinate Judge reversed this decision and dismissed the suit. On second appeal to this Court, the case was remanded for re-consideration with special reference to an *amalnama* produced by the plaintiffs in proof of their alleged title to the land in controversy. The Subordinate Judge, after remand, has declared the title of the plaintiffs to the site of the drain, but has refused the injunction on the ground that as the drain had vested in the Corporation, the right of the plaintiffs had been extinguished. The decree as drawn up is possibly not in exact conformity with the judgment. The plaintiffs have now appealed to this Court, and have pressed their claim for an injunction; there is no cross appeal by the Corporation upon the question of title. Consequently, we must proceed on the assumption that the land in suit covered by the drain appertains to the premises owned by the plaintiffs.

Section 286 of the Calcutta Municipal Act, 1899, provides that all public drains and all drains in, alongside or under any public street, whether made at the charge of municipal funds or otherwise, and all works, materials and things appertaining thereto, shall vest in the Corporation. The drain which passes over the land in suit is not a public drain within the meaning of this section, but is a drain alongside a public street. Section 3, clause 16, shows that the term drain includes a house-drain; consequently, the fact that the drain is a house-drain, made by the owner of the adjoining premises for the outlet of water therefrom, does not exclude it from the operation of section 286. What then is the precise effect when, under section 286, a drain vests in the Corporation; does the Corporation thereby become the proprietor of the soil? The question is by no means of first impression. It has been ruled in a long series of decisions that when a road or a drain vests in a Municipality,

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the effect is not to confer the full proprietary right in the soil itself covered by the road or the drain on the Commissioners : *Chairman of Naihati Municipality v. Kisorilal* (1); *Modhusudan v. Promodanath* (2); *Chairman of the Howrah Municipality v. Kshetra-krishna* (3); *Nihalchand v. Azmat Ali* (4); *Nagar v. Municipality of Dhandhuka* (5); though possibly a different view was taken in *Municipal Commissioners of Madras v. Sarangapani* (6). The principle applicable to cases of this character was elaborately examined by Sir V. Bhashyam Ayyangar, J in *Sundaram v. Municipal Council of Madura* (7), which was followed in *Mada Thapu v. Secretary of State* (8). It was pointed out that the legal effect of the statutory vesting of a street in a Municipality is not to transfer to the Municipality the ownership in the site or soil over which the street exists; the street, qua-street, vests in the Municipality, that is, the surface and so much of the air-space above and so much of the soil below the surface as is reasonably necessary to enable the Municipality adequately to maintain and manage the street as a street, was vested in and belonged to the Municipality. This conclusion is in conformity with what has been recognised as settled law in England and America. In England, the effect of a statutory provision whereby a road or drain is made to vest in a County Council or County Borough, is, not to transfer the free-hold to the authority concerned, but merely to vest in them the property in the surface of the street, road or drain and in so much of the actual soil below and air above as may reasonably be required for its control, protection and maintenance as a high way or drain for the use of the public; to this extent only, the owner is divested of his property. The Courts will not presume that the intention of the Legislature was to confiscate private property and vest it in a public Corporation without compensation granted to the proprietor. The reasonable inference, on the other hand, is that the right of the owner was intended to be abridged, only to the extent necessary for the discharge of the statutory duties imposed on the Corporation for the benefit of the public. Reference may usefully be made to the decision of the House of Lords in *Tunbridge Corporation v. Baird* (9) and of the Judicial Committee in *Sydney Municipal Council v. Young* (10).

(1) (1886) I. L. R. 13 Calc. 171.

(3) (1906) I. L. R. 33 Calc. 1290 (1303).

(5) (1887) I. L. R. 12 Bom. 490.

(7) (1901) I. L. R. 25 Mad. 635.

(9) (1896) App. Cas. 434.

(2) (1893) I. L. R. 20 Calc. 732.

(4) (1885) I. L. R. 7 All. 362.

(6) (1895) I. L. R. 19 Mad. 154.

(8) (1903) I. L. R. 27 Mad. 386.

(10) (1898) App. Cas. 457.

In the former case, Lord Halsbury held that the street qua-street and so much of the actual soil of the street as might be necessary for the purpose of preserving, maintaining and using it as a street, had vested in the Corporation. Lord Herschell added that the vesting of the street vested in the Urban authority such property and such property only as was necessary for the control, protection, and maintenance of the street as a highway for public use. In the latter case, Lord Morris observed that the vesting of a street vested no property in the Municipality, beyond the surface of the street and such portion as might be absolutely necessarily incidental to the repairing and proper management of the street; it did not vest the soil or the land in them as owners, that is, the street vested in them qua-street and not as general property. The doctrine thus formulated has been recognised and applied in a variety of cases: *Bagshaw v. Buxton Local Board* (1); *Rolls v. Saint George Vestry* (2); *Wandsworth Board v. London and S. W. Ry Co.* (3); *Finchley Electric Light Co. v. Finchley Urban Council* (4); *Coverdale v. Charleton* (5); *Poplar Corporation v. Millwal Dock Co.* (6); *Hyde Corporation v. Oldham* (7); *Foley v. Dudley Corporation* (8); *London and N. W. Ry Co. v. Westminster Corporation* (9), reversed (10); *Lodge H. C. Co. v. Wednesbury Corporation* (11); *Wandsworth v. United Telephone Company* (12); *Battersea Vestry v. County of London* (13); *Mayor of Birkenhead v. L. N. W. Ry. Co.* (14); *Lord Provost of Glasgow v. Glasgow S. W. Ry. Co.* (15). No useful purpose would be served by a minute analysis of the varying circumstances of these decisions; but the general principle deducible may be summarised to be that the property of the local authority concerned does not extend further than is necessary for the maintenance and user of the highway as a highway, that, subject to this qualification, the original owner's rights and property remain, and that if the highway ceases to be a highway, the owner becomes entitled to full and unabridged rights of ownership in the property. A similar view has been adopted in the Courts of the United States, where the question of the precise interest taken by the Municipal Corporation has sometimes arisen in relation to title to under-ground

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(1) (1875) 1 Ch. D. 220.

(3) (1862) 31 L. J. Ch. 854.

(5) (1878) 4 Q. B. D. 104.

(7) (1900) 64 J. P. 596.

(9) (1904) 1 Ch. 759.

(11) (1908) App. Cas. 323.

(13) (1899) 1 Ch. 474.

(2) (1880) 14 Ch. D. 785.

(4) (1903) 1 Ch. 437.

(6) (1904) 68 J. P. 339.

(8) (1910) 1 K. B. 317.

(10) (1905) App. Cas. 426.

(12) (1884) 13 Q. B. D. 904.

(14) (1885) 15 Q. B. D. 572.

(15) (1895) App. Cas. 376.

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minerals or alluvial accretions. The doctrine has been adopted that the property or estate vested in the Municipality is such only as is necessary for street purposes and is in trust for public uses and not for purposes of profit and emoluments : Dillon on Municipal Corporations, (1911), Vol. III page 1691 ; *Banks v. Ogden* (1) ; *Thomas v. Hunt* (2) ; *Donovan v. Albert* (3) ; *City of Leadville v. Bohu Mining Co.* (4). In some of these cases, reference was made with approval to the decisions in *Tunbridge Wells v. Baird* (5) *Coverdale v. Charleton* (6) *Wednesbury v. Lodge Holles Colliery Co.* (7) in support of the view that the intent and purpose of a Municipal Statute is to clothe the city in its governmental capacity with the entire title to the streets, as such, for public use, and not for the profit or emolument of the city, in other words, the interest or estate thus conferred upon the Corporation is limited and not absolute, limited by the purposes which the legislature had in view when the Corporation was created.

In the light of these principles, it is obvious that there was no foundation for the claim of the Corporation to include the disputed land within the boundaries of municipal land. The plaintiffs are accordingly entitled not merely to a declaration of their title, which has been unsuccessfully contested by the Corporation but also to a perpetual injunction. The injunction will restrain the Corporation, its officers and servants, from interfering with the exercise, by the plaintiffs, of their right of ownership in the disputed land, except in so far as such interference may reasonably be required for the control, protection and maintenance of the drain thereon for the use of the public.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside in so far as it dismisses the claim for a perpetual injunction. In supersession of the decree of the Subordinate Judge, a decree will be made to the following effect. "The title of the plaintiff is declared to the disputed land ; it is further declared that the drain thereon has vested in the Municipality as a drain. The defendant Corporation its officers and servants are hereby perpetually restrained from interfering with the plaintiffs in the exercise of their rights as proprietors of the disputed land, except where such interference may reasonably be required for the

(1) (1867) 2 Wallace 57.

(2) (1896) 134 M. O. 392 ; 32 L. R. A. 857.

(3) (1902) 11 N. D. 289 ; 58 L. R. A. 775 ; 95 Am. St. Rep. 720.

(4) (1906) 37 Colo. 248 ; 8 L. R. A. N. S. 422.

(5) (1896) App. Cas. 434.

(6) (1878) 4 Q. B. D. 104.

(7) (1907) 1 K. B. 78 ; (1908) App. Cas. 328.

control, protection and maintenance of the drain for the use of the public."

As the plaintiffs have substantially succeeded, they are entitled to their costs in all the Courts.

A. T. M.

*Appeal allowed.*

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*Bengal Tenancy Act (VIII of 1885), Sec. 5 cl. (5)—Applicability—Tenancy, if to be of 100 bighas at the date of suit—Presumption, if applicable to a tenancy existing before the coming into operation of the Act—Sub-division of tenancy—Incidents of divided tenure—Tenancy, real nature of, how determined—Occupancy raiyat holding at a rent not changed for 40 years, if raiyat at fixed rate.*

Clause 5 of section 5 of the Bengal Tenancy Act is not restricted in its application to suits or proceedings between landlords and tenants under the Act. Neither is it limited to cases of tenancy of more than 100 bighas in existence as such at the date of the institution of the suit wherein the question of the nature of such a tenancy arises for determination.

The clause is a provision, not of substantive but of adjective law; it lays down a presumption and changes the burden of evidence. The presumption is applicable to tenancy which existed before the commencement of the Act. The clause only codifies what had been a recognised doctrine under the old law.

The clause is applied to determine the character of the tenancy of 126 bighas, although that tenancy has been sub-divided into two tenancies before the Bengal Tenancy Act came into operation. The tenure being divisible, the fact of sub-division does not create a breach of its continuity; and each fragment carved out of the original tenure retained its incidents.

*Adit v. Sukhraj* (1) and *Chandra Kanta v. Ram Krishna* (2) referred to.

The fact that some tenants of the land themselves carried on cultivation and did not collect rent from under-tenants, is not by any means decisive as to the character of the tenancy. The real nature of the tenancy is determined by proof of the purpose of the original grant.

\* Appeals from Appellate Decrees Nos. 2963 and 3450 of 1913, against the decision of S. C. Mallik Esq., District Judge of Nadia, dated the 30th July, 1913, affirming that of Babu Nagendra Nath Dhar, Subordinate Judge of Nadia, dated the 23rd December, 1912.

(1) (1912) 17 C. L. J. 435.

(2) (1916) 20 C. W. N. 1002.



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*Bibhudendra v. Debendra* (1) referred to.

The mere forbearance on the part of the landlord to claim enhancement of rent from an occupancy raiyat for 40 years, does not lead to an inference that the original contract was for payment of rent by the tenant at a fixed rate for ever.

Appeals by both parties.

Suit for ejectment.

The material facts and arguments appear from the judgment.

*Sir S. P. Sinha, Dr. Dwarka Nath Mitter* and *Babu Debendra Nath Mandal* for the Appellant in No. 2963.

*Babus Mahendra Nath Roy* and *D. N. Bagchi* for the Respondent in No. 2963 and for the Appellant in No. 3450.

*Babu Biraj Mohan Mojumdar* (for *Dr. Dwarka Nath Mitter*) for the Respondent in No. 3450.

The judgment of the Court was delivered by

June, 23.

**Mookerjee, J.**—The subject matter of the litigation, which has culminated in these appeals, comprises the lands of three tenancies held by one Kaliprasanna Pal under the plaintiff. The plaintiff asserts that the tenancies were non-transferable, and, yet, on the 22nd June 1909, the tenant transferred the lands, to the defendant who entered into wrongful possession. He consequently instituted this suit on the 20th September 1911, for recovery of possession on declaration of title. His claim was resisted substantially on the ground that the tenancies were transferable. As regards the first two tenancies, each of which consisted of 25 bighas of land, the defendant alleged that they were ryoti holdings held at a fixed rent and were consequently transferable in the same way as a permanent tenure under section 18 of the Bengal Tenancy Act. As regards the third tenancy, which comprises an area of 63 bighas, she pleaded that it constituted a transferable tenure. The Court of first instance came to the conclusion that the first two tenancies constituted non-transferable occupancy holdings and that the third was a transferable tenure. In this view, the Subordinate Judge made a decree in favour of the plaintiff for the lands comprised in the first two tenancies and dismissed his claim in respect of the lands included in the third tenure. Appeals were thereupon preferred against the decision of the Subordinate Judge as well by the plaintiff as by the defendant. The District Judge has dismissed both the appeals and affirmed the decision of the trial Court. In this Court, the decree of the District Judge has been assailed by

each of the parties in so far as that decision is adverse to his interests.

The question for determination in the appeal preferred by the plaintiff is, whether the lands comprised in the third tenancy constitute a transferable tenure. It has been found by both the Courts below that the 63 bighas now in suit formed part of a tenure of 126 bighas, which was divided into two tenancies of 63 bighas each, at some date anterior to the commencement of the Bengal Tenancy Act. They have held in substance that the statutory presumption embodied in clause 5 of section 5 of the Bengal Tenancy Act is applicable to the circumstances of this case, that, till the contrary is proved, the tenancy of 126 bighas must be presumed to have been a tenure, and that, consequently, the lands now in suit, which comprise one-half of the lands included in that tenure also constitute a tenure. This view is assailed by the appellant, who assigns three reasons in support of the contention that clause (5) of section 5 has no application to the present litigation namely, *first*, that the clause like section 50, is limited in its application to suits or proceedings between landlords and tenants under the Bengal Tenancy Act; *secondly*, that the clause is applicable only to lands which constitute a tenancy of more than 100 standard bighas at the date of the institution of the suit wherein the character of that tenancy requires determination; and, *thirdly*, that the clause is, in any view, limited in its application to tenancies which existed as tenancies of more than 100 standard bighas at the date of the commencement of the Bengal Tenancy Act.

The first branch of this contention is sought to be supported by reference to section 50. In our opinion the terms of clause 5 of section 5, when contrasted with the language used by the Legislature in section 50, show conclusively that there is no foundation for the argument. Sub-section 2 of section 50 states explicitly that the presumption mentioned therein applies only to suits or proceedings under the Act: *Mahabir v. Fox* (1); *Bazlal v. Satis* (2); *Nityanand v. Nand Kumar* (3). If the Legislature had desired that clause 5 of section 5 should have a similarly restricted application, appropriate words might have been used to indicate that intention; and it would be clearly wrong to read into the section words not to be found there. There is thus no substance in the first branch of the contention of the appellant.

The second branch of the contention is equally groundless. The

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(1) (1909) 9 C. L. J. 467.

(2) (1911) 13 C. L. J. 418.

(3) (1910) 13 C. L. J. 415.

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argument is that clause 5 is limited to cases of tenancies of more than 100 bighas in existence as such at the date of the institution of the suit wherein the question of the nature of such a tenancy arises for determination. The answer obviously is that the language used by the Legislature in clause 5 is perfectly general and does not support this narrow construction. As is clear from the decisions in *Bengal Indigo Co. v. Raghubar Das* (1), and *Khatajan v. Aswini* (2), the presumption applies to cases of tenancies created before the Act came into force.

The third branch of the contention of the appellant has been sought to be supported by an appeal to the principle that a statute is deemed to be, *prima facie*, not retrospective in its operation. The rule on this subject is well-settled and is accurately stated by Lopes L. J. in the case of *In re School Board Election for Parish of Pulborough* (3). "Every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation or imposes a new liability or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect." As Wright J. observed in *In re Athlumney* (4), "a retrospective operation is not to be given to a statute so as to impair an existing right of obligation, *otherwise than as regards matter of procedure*," or, in the words of Lord Selborne, in *Marin v. Stark* (5), quoted by Lord Morris in *Reynolds v. A. G.* (6), "words not requiring a retrospective operation, *so as to affect an existing status prejudicially*, ought not to be so construed." What, then, is the true position, when we test the scope of clause 5 of section 5 in the light of these principles. We cannot, by any stretch of language, hold that it creates any new rights, or purports to affect any rights created before the commencement of the Bengal Tenancy Act. It simply furnishes a mode of proof of the character of tenancies of certain descriptions. If the area held by a tenant exceeds 100 standard bighas and a question arises as to the status of such a tenant, the Legislature lays down that the tenancy is to be presumed to be that of a tenure-holder; but, be it noted, that the presumption thus raised is rebuttable. The clause is, consequently, a provision, not of substantive but of adjective law; it lays down a presumption and changes the burden of evidence. Whereas, in the absence of the presumption, the party who affirmed that the tenancy was of a

(1) (1896) L. R. 23 I. A. 158; I. L. R. 24 Calc. 272.

(2) (1909) 9 C. L. J. 827.

(3) (1894) 1 Q. B. 725 (737).

(4) (1898) 2 Q. B. 547 (551).

(5) (1890) 15 App. Cas. 384 (388).

(6) (1896) A. C. 240 (244).

particular description would have to give evidence in support of his contention, the presumption, where it applies, relieves the party relying thereon from the obligation to furnish such proof in the first instance. If in respect of a tenancy, the area whereof exceeds 100 bighas, it is contended that the tenant is a raiyat and not a tenure-holder, the burden of proof lies upon the party who makes the assertion, that is, he has to rebut the presumption. In substance here as in other cases the effect of the presumption is to shift the burden of evidence or the burden of proof as it is sometimes inaccurately called. The establishment of the presumption of law by proof of facts from which it arises sustains the burden of evidence, and so far as it extends shifts it to the opposing side. This is implied by the fact that it creates a *prima facie* case; for the burden of evidence rests always on him who has to create or meet such a case, according as he has or has not the burden of proof properly so called; consequently the theoretical effect of a presumption is that it is a legal ruling which affects the duty of producing evidence. This may have important practical consequences but that does not alter the quality of a presumption and make it a rule of substantive law rather than a rule of mode of proof. We can see no valid reason why the presumption should not be applied to a tenancy which existed before the commencement of the Bengal Tenancy Act; one might as well contend that the provisions of the Indian Evidence Act are inapplicable to events and circumstances which took place before the commencement of that Act. Reliance, however, has been placed upon a passage from the judgment of the Judicial Committee in the case of *Bengal Indigo Company v. Raghubar Das* (1) where Lord Watson observed that "it was not necessary to notice the reasoning which prevailed in either of the Courts below, because it entirely ignored the statutory definition of the word 'raiya' contained in section 5, sub-section 5, which was in the following terms: "where the area held by a tenant exceeds 100 standard bighas, the tenant shall be presumed to be a tenure-holder until the contrary is shown." Possibly, Lord Watson intended to refer to the definition of the term 'raiya' as given in section 5, sub-section 2, for sub-section 5 does not at all define the term raiya; it lays down, as we have explained, a statutory presumption in respect of a tenancy which exceeds 100 standard bighas in area, a presumption which is expressly made operative only till the contrary is established. We may further point out that the pre-

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sumption embodied in Rule 5, cl. (5) does not incorporate a novel principle into our law but merely codifies what had been a recognised doctrine under the old law. The cases of *Dhanpat v. Gooman* (1); *Gopimohan v. Sibchandra* (2) and *Saratchandra v. Ratubuddin* (3) show that the area of the land held by the tenant was taken into consideration along with other circumstances in the determination of the question of status. The only difference caused by the adoption of the presumption is that we have now a definite rule of evidence, a crystalized mode of proof for as Walker, J. puts it in *Cogdell v. Ry. Co.* (4) "an inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded." We do not think it would be right to put a narrow construction upon the presumption so as to defeat the object which the Legislature had in view namely to import certainty into the law and thereby to shorten, if not to prevent, litigation. We are consequently of opinion that sub-section 5 of section 5 may be properly applied to determine the character of the tenancy of 126 bighas, although that tenancy had been subdivided into two tenancies before the Bengal Tenancy Act came into operation. The tenure was divisible; the fact of sub-division clearly did not create a breach of its continuity; and each fragment, carved out of the original tenure, retained its incidents: *Adit v. Sukhraj* (5); *Chandrakanta v. Ramkrishna* (6). The tenancy of 63 bighas now in suit has thus been rightly held to be a transferable tenure. Though it was open to the plaintiff landlord to establish the contrary, he has failed in the attempt. The only circumstance whereon reliance has been placed on his behalf is that some tenants of the land themselves carried on cultivation and did not collect rent from under-tenants. That fact, however, is not by any means decisive as to the true character of the tenancy: *Bibhudendra v. Debendra* (7). The real nature of the tenancy would be determined by proof of the purpose of the original grant; *Durga v. Kalidas* (8); *Prannatha v. Nilmani* (9); *Promoda v. Asiruddin* (10); *Bamapada v. Midnapore Zemindari Co.* (11); but it has not been shown that the tenancy, though in respect of 126 bighas, was created for the purposes of cultivation by the grantees. The presumption thus stands

(1) (1864) W. R. Gap. No. Act X. Rul. 61.

(2) (1864) 1 W. R. 68.

(3) (1909) 16 C. L. J. 271.

(4) (1903) 132 N. C. 852.

(5) (1912) 17 C. L. J. 435.

(6) (1916) 20 C. W. N. 1002.

(7) (1913) 20 C. L. J. 140.

(8) (1881) 9 C. L. R. 449.

(9) (1911) 14 C. L. J. 38; 15 C. W. N. 902.

(10) (1911) 15 C. W. N. 896.

(11) (1912) 16 C. L. J. 322.

unrebutted and we must hold that there is no substance in the contention of the appellant. The appeal is consequently dismissed with costs.

We have next to deal with the appeal of the defendant, which involves the determination of the question of the true character of the first two tenancies. These tenancies are admittedly agricultural holdings; the only point of difference is that while the plaintiff landlord alleges that the tenancies were non-transferable occupancy holdings, the defendant purchaser asserts that they constituted holdings at fixed rates of rent. The burden clearly lies upon the defendant to establish the truth of her allegation. It is plain that the tenancies were not transferable by local usage or custom. It is equally plain that sub-section 2 of section 50 has no application, because this is a suit, not under the Bengal Tenancy Act, but under the general law for ejectment of an alleged trespasser. The defendant is consequently driven to rely upon the conduct of the parties, in the absence of direct evidence as to the terms of the original contract between them. No document is produced nor is oral evidence forthcoming to show that at the time when the grants were made, the rent was fixed in perpetuity. But the defendant has proved that the rate of rent has not been changed during the last 40 years; she also asserts that the origin of the tenancies is unknown, although the Courts below have concurrently held that the tenancies were created 40 years prior to the institution of the suit; this however, it is said, is not based on any evidence on the record. We shall assume in favour of the defendant that the time of the origin of the tenancies is unknown and that there is no direct evidence of the terms of the initial contract between the parties. The question, consequently, arises, whether from these circumstances, it follows as a matter of law that the contract of tenancy in its inception must have been a tenancy at a fixed rate of rent. In support of the affirmative of this proposition, reference has been made on behalf of the defendant-appellant to the decision of this Court in *Maharam Chaprasi v. Tellamuddin Khan* (1). That was a case of a non-agricultural tenancy, let out for residential purposes. It was established that the origin of the tenancy was unknown, that the land had been held at a small and uniform rate of rent for at least 60 years, and that the holding had been treated, as transferable and heritable. The Court below declined to infer from these circumstances that the tenancy was permanent, because there was no permanent substantial structure erected by

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the tenant on the land. This court reversed that decision, held that the question was of mixed law and fact, and concluded, on the authority of a long line of decisions of the Judicial Committee, that from the facts proved, the only inference deducible was that the tenancy in its inception was permanent. The case before us is of a very different character. Here, we have two plots of agricultural land held by tenants who have been unquestionably occupancy raiyats; their rent has not been altered for a term of 40 years; and the origin of the tenancies is unknown. Can we hold as a matter of law that the only inference legitimately deducible from these facts is that at the inception of the tenancies, the rent was, by agreement of parties, fixed in perpetuity? It is plain that the inference as to the terms of the original contract is drawn from the conduct of the parties. The only conduct of the plaintiff or his predecessor whereupon reliance is placed by the defendant is his omission to claim enhancement of rent for a period of 40 years. Does such forbearance on the part of the landlord necessarily justify the inference that the contract of tenancy in its inception was for payment of rent fixed in perpetuity? The answer must obviously be in the negative. The conduct of the landlord, though consistent with the hypothesis that the rent was fixed in perpetuity, is equally consistent with a very different hypothesis. The landlord might not have sued for enhancement of rent, because in view of the amount of rent already fixed as well as the character of the land comprised in the tenancies no further rent could be legitimately claimed. We have no information about the history of the holding, or the condition of the land included therein. We do not know what would be fair rent at the present time or would have been the fair rent during years past. In these circumstances, from the mere forbearance on the part of the landlord to claim enhancement of rent even for 40 years, the inference does not follow as a matter of course that the original contract was for payment of rent by the tenant at a fixed rate for ever. If we were to accede to the contention of the defendant appellant, we would be driven to hold in substance that every landlord who refrains from the institution of a suit for enhancement of rent of an occupancy holding, does so at his peril and that his forbearance, however just, will raise a presumption against him that the tenant held at a rent fixed in perpetuity. From whatever standpoint we examine the case, it thus transpires that this appeal also is groundless and must be dismissed with costs.

A. T. M.

*Appeals dismissed.*

*Before Mr. Justice D. Chatterjee and Mr. Justice Newbould.*

SHAIKH SAHAD

*v.*

KRISHNA MOHAN BASAK. \*

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1916.

June, 16, 23.

*Rent, suit for—Original tenant, heirs of—Liability, if joint and several—Decree against one, if maintainable—Indian Contract Act (IX of 1872), Sec. 43.*

In a suit by a co-sharer landlord for arrears of rent against the heirs of the original tenant the Court below passed a money decree, against one of the defendants only for the entire claim :

*Held*, that the decree could not stand inasmuch as it was not a case of a joint contract which might be enforced against any of the joint contractors, but the defendants became jointly interested by operation of law in a contract made by a single person.

*Sir Rameswar Singh v. Jaideb Jha* (1) and *Jogendra Nath Roy v. Nagendra Narain Nandi* (2) distinguished.

*Kasi Kinkar Sen v. Satyendra Nath Bhadra* (3) followed.

Appeal by Defendant No. 1.

Suit for rent.

The material facts will appear sufficiently from the judgment.

*Babu Surendra Nath Das Gupta* for the Appellant.

*Dr. Sarat Chandra Bysack* and *Babu Chandra Sekhar Sen* for the Respondent.

C. A. V.

The judgment of the Court was as follows :

The plaintiff, a co-sharer landlord, brought a suit for arrears of rent against defendants, 1, 2, and 3 the heirs of his original tenant. Defendant No. 1 did not appear but defendants Nos. 2 and 3 appeared and filed a written statement denying the rate of rent alleged by the plaintiff and pleading want of parties and dispossession of a part of the holding. The Court of first instance dismissed the suit for want of parties and dispossession of a part of the holding and expressed an opinion that the plaintiff had failed to prove the rate alleged by him. On appeal by the plaintiff the learned Subordinate Judge has given a money-decree against defendant No. 1 only for the entire claim. The defendant No. 1 appeals and it is contended on his behalf that the learned Subordinate Judge is wrong. The learned Subordinate Judge has held that

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\* Appeals from Appellate Decrees, Nos. 143 and 144 of 1914 (with Rules Nos. 385 and 586 of 1914) against the decision of Babu Mohim Chandra Chakravarti, officiating Subordinate Judge at Dacca, dated the 12th August, 1913, reversing the decision of Babu Gopal Chandra Biswas, Additional Munsiff at Dacca, dated the 27th September, 1912.

(1) (1910) 12 C. L. J. 591.

(2) (1907) 11 C. W. N. 1026.

(3) (1910) 12 C. L. J. 642.



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defendant No. 1 used to pay the rent as the representative of the old tenant and is therefore liable to pay the whole rent although there is no evidence that defendant No. 2 or 3 ever authorised him to pay rent. Now the defendant No. 1 was the eldest son of his father, defendant No. 2 being a minor and defendant No. 3 a female, and he might be taken as representing the family in their relations with the landlord and if the landlord had brought a suit against him alone as his recorded tenant, there would perhaps have been no difficulty in his obtaining a decree for the rent claimed against him alone, but the landlord has chosen to sue him as one of three tenants who stands in the place of one deceased tenant. Having brought his suit against all the heirs he has recognised them all as his tenants and they must all be taken as one body of registered tenants holding one single holding. There is no case of a joint contract which might be enforced against any of the joint contractors, because the defendants have not made any joint contract. Section 43 of the Contract Act speaks of two or more persons making a joint promise and can have no application where parties become jointly interested by operation of law in a contract made by a single person. Reliance has been placed on the case of *Sir Rameswar Singh v. Jaideb Jha* (1), that was not a case in which the contract of one person was inherited by more than one : at least the report does not show that it was such a case. The observation there that "it was competent to the plaintiff to bring his suit against any number of several joint tenants" must be read as applying to the facts of that case and for all that we know that case may have been one in which the contract of tenancy was entered into jointly by the several tenants. The same remarks may also be made as to the case of *Jogendra Nath Roy v. Nagendra Narain Nandi* (2). The later case of *Kasi Kinkar Sen v. Satyendra Nath Bhadra* (3) is more in point as the case was one of an inherited contract and supports the contention of the appellant. We think it was not open to the learned Judge to make for the plaintiff a case that he did not make for himself. The decree of the lower appellate Court must therefore be set aside and the case sent back for a decision in accordance with law as a case against all the defendants. Costs to abide the result.

This judgment will govern second appeal No. 143 of 1914.

The Rules will stand discharged.

A. N. R. C.

*Appeal allowed, case sent back.*

(1) (1910) 12 C. L. J. 591.

(2) (1907) 11 C. W. N. 1026.

(3) (1910) 12 C. L. J. 642 ; 15 C. W. N. 191.

*Before Sir Lancelot Sanderson, Knight, Chief Justice and  
Sir Asutosh Mookerjee, Knight, Judge.*

PRIYA NATH PAL.

v.

TARINI CHARAN ROY AND OTHERS. \*

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May, 9.

*Rent, enhancement of—Rent, payable partly in cash and partly in kind—Bengal Tenancy Act (VIII of 1885), Sec. 30, applicability of.*

The word "money-rent" in section 30 of the Bengal Tenancy Act refers to a tenancy where the rent is solely payable in money, and as such the section does not apply to a case in which rent is paid partly in cash and partly in kind.

Appeal by the Plaintiff.

Suit for enhancement of rent of an occupancy raiyat on the ground of rise in prices of staple food crops during the currency of the present rent. It appears that the holding was held at a rent payable partly in cash and partly in kind. The question for determination was whether section 30 of the Bengal Tenancy Act applied to the case.

*Babus Sarat Chandra Roy Chowdhury and Jyotish Chandra Hazra* for the Appellant.

*Babus Sarat Chandra Khan and Hirendra Nath Ganguly* for the Respondents.

The following judgment was delivered by

**Chapman, J.**—This appeal arises out of a suit under section 30 of the Bengal Tenancy Act for the enhancement of the rent of an occupancy raiyat upon the ground that there had been a rise in the average local price of staple food crops during the currency of the present rent. The holding was held at a rent of Rs. 17-15-9 gds. in cash and 2 *aras*, that is, about 13 maunds of paddy in kind. The Munsiff and the learned Subordinate Judge have both dismissed the suit on the preliminary ground that section 30 of the Bengal Tenancy Act does not apply to a case in which rent is paid partly in cash and partly in kind.

The landlord has appealed and it has been argued, and the argument has been conducted with considerable ability and knowledge on the law of tenancy that has been applied in this country,

\* Letters Patent Appeal, No. 51 of 1913, against the decision of Mr. Justice Chapman, dated the 19th March, 1913, in Appeal from Appellate Decree, No. 629 of 1912, against the decree of Babu Surendra Nath Mitra, Subordinate Judge, 1st Court, at Midnapur, dated the 23rd January, 1912, affirming that of Babu Atul Chandra Banerjee, Munsiff, 2nd Court, at Midnapur, dated the 21st February, 1911.

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that the word " money rent " in section 30 of the Bengal Tenancy Act can be held to mean that portion of the rent which is payable in money, so that the section 30 interpreted would be read to mean that the landlord of a holding held at a rent payable in cash and in kind can institute a suit to enhance the portion of the rent payable in money. This would be straining the language of the section and I have to see whether as it has been contended, this particular case has been left entirely unprovided for in the Act, and if so whether it was with intention that it was so left unprovided for. Now the result of the Act of 1885 in this connection was to leave rents payable in kind alone, except in so far as the act provided for their commutation into rent payable in money. This was a change from the previous Act of 1869 which so far as the law of enhancement was concerned made no distinction between rents payable in money or in kind.

For the determination of the question whether the Act apart from section 30 provides at all for the enhancement of rent partly payable in cash and partly in kind upon the ground of rise in price, I have to turn to the section providing for commutation, and from that section it is clear that there is no provision for enhancement of such rent on the ground of rise in price. Now the question is whether this omission was intentional or not. I observe that when this section was amended in 1907 it was amended in order to expressly provide for a case of this kind, that is a case in which rent is payable partly in kind and partly in cash. Simultaneously with that amendment an amendment was made that in case of commutation rent may be simultaneously enhanced upon the ground recited in section 30 (c), namely of improvement in the productive powers of the land by reason of improvement made by the landlord. Now when the Legislature went to the length of carefully selecting one of the clauses of section 30 for the purpose of incorporation into the commutation section 40, it is clear that the omission to provide enhancement on the ground of rise in price was intentional so far as the commutation section is concerned.

I therefore find that this particular case was intentionally left unprovided for in the other provision of the Bengal Tenancy Act, and this being so I feel unable to constrain the language of section 30 so as to make it include cases where rent is payable partly in money and partly in kind.

I may say that on behalf of the respondents certain other preliminary objections to the suit were raised, but having regard to the

view which I have expressed on the first point, it is unnecessary to go into them.

The appeal is dismissed with costs.

Against this decision the plaintiff appealed under section 15 of the Letters Patent.

*Babus Mohendra Nath Roy and Jyotish Chandra Hazra* for the Appellant.

*Babus Sarat Chandra Khan and Hirentra Nath Ganguly* for the Respondents.

The following judgments were delivered :

**Sanderson C.J.**—In spite of the argument which has been addressed to us by Mr. Roy, and in which I was personally much interested, I do not think we should interfere with the judgment of the learned Judge ; the short ground is that it is common knowledge that the Bengal Tenancy Act was an Act passed in the interests of tenants, and it is also common knowledge that rents are sometimes paid in money, sometimes in kind, and sometimes partly in money and partly in kind ; and, when I find the words of section 30 are "The landlord of a holding held at a money-rent," I think it must be taken that the statute is referring to a tenancy where the rent is solely payable in money. That is borne out not only by the words of the section itself, but also by the words of the other sections to which Mr. Roy drew our attention, especially section 38, as to which I made some remarks during the course of the argument which I need not repeat.

For these reasons the appeal must be dismissed with costs.

**Mookerjee J.**—I agree.

A. N. R. C.

*Appeal dismissed.*

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*Chapman, J.*

*May, 9.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.*

KALIPADA SARKAR

*v.*

HARI MOHAN DALAL.\*

*Decree, execution of—Decree, validity of, if can be raised in execution—Judgment against a lunatic—Lunatic not represented by a legal guardian.*

\* Appeal from Original Order No. 575 of 1915, against the decision of Babu Amulya Charan Ghosh, Subordinate Judge of 24 Parganas, dated the 20th November, 1915.

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Every order and judgment, however erroneous, is good, until discharged or declared inoperative and the execution Court cannot enquire into the validity or propriety of the decree.

*Chuck v. Cremer* (1) referred to.

A proceeding to enforce a judgment is collateral to the judgment, and, therefore, no enquiry into its regularity or validity can be permitted in such a proceeding. Hence a judgment against a person who was *non compos mentis* at the time of the trial, and yet was not represented by a legal guardian, is not to be impeached in execution, but should be reversed or annulled in some direct proceeding taken for that purpose.

*Rasidunnisa v. Ismail* (2) referred to.

Appeal by the Objector.

Application for execution of decree.

The material facts and arguments appear from the judgment.

*Babus Bepin Bihary Ghose and Kshiti's Chunder Chakrabarti* for the Appellant.

*Babus Biraj Mohan Mojumdar and Satindra Nath Mookerjee* for the Respondent.

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The judgment of the Court was delivered by

June, 27.

**Mookerjee, J.**—This appeal is directed against an order for execution of a decree for costs. The decree was made on the 24th September 1913 and is in these terms: "it is ordered and decreed that this suit be dismissed, and the costs of the suit, Rs. 400-8-9, be paid by the plaintiff to the abovenamed defendant with interest at 6 per cent per annum from this day till date of realisation." In the cause-title, set out at the commencement of the decree, the plaintiff is described as follows: "lunatic Brajogopal Sarkar, represented by certificated guardian under Act XXXV of 1858, Srimati Mahamaya Dasi, wife of the said Brajogopal Sarkar." The decree, consequently, entitles the successful defendants to recover the costs allowed in his favour from the lunatic Brajogopal Sarkar. On the 2nd February, 1915, the defendant decree-holder applied for execution in accordance with O. XXI, rule 11 (2). Execution was sought against Kalipada Sarkar, the infant son of Brajogopal Sarkar, who had died in the interval. The Court, accordingly, directed notices to issue under O. XXI, rule 22 (1), clauses (a) and (b). The usual notice was also directed to issue upon Mahamaya Dasi, who had been proposed by the decree-holder

(1) (1846) 2 Phil 113 (115); 1 C. P. Cooper 338 (342).

(2) (1909) L. R. 36 I. A. 168; 1 L. R. 31 All. 572.

for appointment as guardian-ad-litem of the infant. On the 17th March, 1915, the Court, with the consent of the proposed guardian, appointed her guardian-ad-litem of the infant. On the 21st April, 1915, the Court issued a fresh notice under O. XXI, rule 22 (1) (b), which was served in due course. On the 10th July, 1915, the lady filed a petition of objection. She stated that she had lately attained majority and was not a fit and proper person to act as guardian-ad-litem of her infant son. On the merits, she urged that when the decree for costs was made in the original suit, she was herself a minor, not competent to act as next friend of the lunatic, and that the decree was consequently illegal and *ultra vires*, incapable of execution against the estate of her husband in the hands of his minor son. The Court overruled these objections, and directed execution to proceed "against the assets of Brajogopal Sarkar, the deceased judgment-debtor, in the hands of his minor son." The propriety of this order is the subject of controversy in the present appeal, preferred on behalf of the infant by his mother.

The first objection taken in the Court below is entirely groundless. The lady consented to act as guardian-ad-litem; there is no reason why she should be discharged; there is no conflict of interest between her and her infant son in this matter. Indeed this objection, though mentioned, has not been seriously pressed in this Court.

The second objection taken in the Court below raises a question of some nicety. The facts, essential for the full appreciation of the arguments addressed to us, may be briefly stated. The original suit was instituted on behalf of the lunatic by his wife, who had been appointed Manager of his property when he was adjudged a lunatic on the 5th August, 1911 under Act XXXV of 1858. The defendant pleaded that the suit was not maintainable, inasmuch as the Manager was herself a minor and incompetent under the law to act as next friend of the lunatic. The Subordinate Judge took evidence upon this preliminary question, and came to the conclusion that Mahamaya Dasi was a minor, not only when she got herself appointed Manager of the estate of her husband under Act XXXV of 1858 but also at the date of the institution of the suit, and had not attained majority even at the time of the trial. The court held accordingly that she could not proceed with the suit on behalf of her husband and dismissed it with costs. The decree set out above was drawn up on the basis of this judgment. The question for determination is, whether the validity of the decree can be questioned in execution proceedings on the ground that as the lunatic plaintiff

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was not properly represented by a competent next friend in the suit, no operative decree for costs could have been made against him.

It is indisputable that the Court executing a decree must take the decree as it stands and has no power to go behind the decree or to entertain an objection to the legality or correctness of the decree. The principle was recognised by the Judicial Committee in the cases of *Papamma v. Vira Pratapa* (1), and *Gris Chunder v. Shoshishekkharieswar* (2) and has been applied in a long series of decisions: *Hassan Ali v. Ganzi Ali* (3); *Rashbehari v. Joynanda* (4); *Shib Lakshan v. Tarangini* (5); *Madan Mohan v. Bhikhar* (6); *Ram Nath v. Basanta Narain* (7); *Prasanna v. Sris Chandra* (8); *Ramphal v. Ram Baran* (9); *Muttia v. Virammal* (10); *Venkatachala v. Venkatarama* (11); *Appa v. Krishna* (12); *Budan v. Ramchandra* (13); *Jargobind v. Pateswari* (14); *Chhoti v. Rameshwar* (15); some of those were reviewed by this Court in *Rama Prosad v. Anukul Chandra* (16). The doctrine itself is not disputed before us, but its applicability to the circumstances of this case is denied by the appellant. The argument in substance is that the lunatic was not at all represented before the court at the trial of the suit, and the court was consequently not competent to pass a decree to his detriment. This position is supported by a reference to three decisions of the Judicial Committee, *Khiairaj Mal v. Daim* (17); *Rasidunnesa v. Muhammad Ismail* (18); and *Radhaprasad v. Lalsahab* (19), which show that a court is not competent to make an operative decree against a person, not a party to the suit or properly represented on the record; but, still the question remains, whether an objection on this ground can be raised in proceedings in execution of such a decree. We are of opinion that the answer should be in the negative. The point is really concluded by the decision of the Judicial Committee in *Rasidunnesa v. Muhammad Ismail* (18). There, the plaintiff sued for a declaration that two decrees and three sales

(1) (1896) L. R. 23 I. A. 35; I. L. R. 19 Mad. 249.

(2) (1900) L. R. 27 I. A. 110; I. L. R. 27 Calc. 951 (967).

(3) (1903) I. L. R. 31 Calc. 179.

(4) (1906) 4 C. L. J. 475.

(5) (1908) 8 C. L. J. 20.

(6) (1912) 16 C. L. J. 517.

(7) (1913) 18 C. L. J. 209.

(8) (1915) 22 C. L. J. 561.

(9) (1882) I. L. R. 5 All. 53.

(10) (1886) I. L. R. 10 Mad. 283.

(11) (1901) I. L. R. 24 Mad. 665.

(12) (1901) I. L. R. 25 Mad. 537.

(13) (1887) I. L. R. 11 Bom. 537.

(14) (1907) 27 All. W. N. 286.

(15) (1902) 6 C. W. N. 796.

(16) (1914) 20 C. L. J. 512.

(17) (1904) L. R. 32 I. A. 23; I. L. R. 32 Calc. 296 (313-315).

(18) (1909) L. R. 36 I. A. 168; I. L. R. 31 All. 572.

(19) (1890) L. R. 17 I. A. 150; I. L. R. 13 All. 53.

in execution of decrees were invalid so far as concerned her share in her paternal estate, which purported to be bound thereby. The two decrees were alleged to be not binding upon her, because, amongst other reasons, her sister, a married woman, had, in the suits in which those decrees were made, been improperly appointed her guardian-ad-litem. The defendants asserted the validity of the decrees and sales in execution, and pleaded, *inter alia*, that the suit was barred by the provisions of section 244 of the Code of Civil Procedure of 1882. The Subordinate Judge held that the suit was not barred and decreed it on the merits. The High Court (Stanley C. J. and Burkitt J.) held on appeal that the suit was barred under section 244. They observed that the decrees, whereon the execution proceedings were founded, were not and could not be impeached in the suit; the impeached transactions were proceedings of those decrees in execution and the proper course for the plaintiff was to raise these objections under section 244 and not by a separate suit, as the questions "arose between the parties to the suit in which the decree was passed or their representatives and related to the execution of the decree." The Judicial Committee, on appeal reversed the decision of the High Court, and restored that of the primary Court. Sir Andrew Scoble, who delivered the judgment of their Lordships, observed: "Section 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed, this is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term. Her sister was a married woman, and, therefore, was disqualified under section 457 of the Code from being appointed guardian for the suit." That a question of this character cannot be determined in execution, follows from two other decisions of the Judicial Committee, *Radhaprasad v. Lalsahab* (1) and *Khiaraj Mal v. Daim* (2), where relief was granted in regular suits on the ground that the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. Lord Watson observed in the first case that an operative decree, obtained after the death of a defendant, by which the extent and quality of his liability are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced. Lord

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(1) (1890) L. R. 17 I. A. 150; I. L. R. 13 All. 53.

(2) (1904) L. R. 32 I. A. 23; I. L. R. 32 Calc. 296.



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Davey observed in the second case that as against persons who were not parties to the proceedings or properly represented on the record, the decrees and sales purporting to be made, would be a nullity, and might be disregarded without any proceeding to set them aside. These two cases were argued by Counsel, who had an intimate knowledge of Indian Codes, before eminent Judges, who possessed an extensive acquaintance with our system of procedure (Sir Barnes Peacock, Sir Richard Couch and Sir Arthur Wilson). If the contention of the appellant is well founded, it is singular that it did not strike any body that the suits were barred under section 244, as the question in controversy could and should have been raised in execution proceedings. It is worthy of note that in *Pasumarti v. Ganti* (1), when an objection of this character was raised in execution proceedings, the application was converted into a plaint under the provisions of section 47 (2), Civil Procedure Code and this course was approved by the High Court. Our attention, however, has been drawn to the decision in *Subramania v. Vaithinatha* (2), where objection was allowed to be taken in execution proceedings that the decree under execution was passed after the death of the defendant and before his legal representatives were impleaded. Reliance was placed upon the decision in *Janardhan v. Ram Chandra* (3); *Radhaprasad v. Lalsahab* (4) and *Imdad Ali v. Jagan Lal* (5). In the first case, objection was taken, not in execution of the decree, but by way of application to the Court which had passed it. In the second case, the objection was taken, not in execution but by way of a regular suit. In the third case, the objection was sustained, though taken in execution; but this view is clearly opposed to the decision of the Judicial Committee in *Rasidunnessa v. Muhammad Ismail* (6). On the other hand, we find that in *Gomatham v. Komandur* (7) under somewhat similar circumstances, the judgment-debtor was not allowed to object to the validity of the decree in the course of its execution. The position is obviously different where as in *Arjun Das v. Gunendra Nath* (8), objection is taken to the execution proceedings on the ground of the death of the judgment-debtor not before but after decree. We also find that in *Amichand v. The Collector of Sholapur* (9), the question was raised by way of an

(1) (1914) 28 M. L. J. 525.

(2) (1913) I. L. R. 38 Mad. 682.

(3) (1901) I. L. R. 26 Bom. 317.

(4) (1890) L. R. 17 I. A. 150; I. L. R. 13 All. 53.

(5) (1895) I. L. R. 17 All. 478.

(6) (1909) L. R. 36 I. A. 163.

(7) (1903) I. L. R. 27 Mad. 118.

(8) (1914) 20 C. L. J. 341.

(9) (1888) I. L. R. 13 Bom. 234.

application to the High Court to set aside a decree, so improperly made, in the exercise of its extraordinary jurisdiction. The substance of the matter is that a proceeding to enforce a judgment is collateral to the judgment, and, therefore, no enquiry into its regularity or validity can be permitted in such a proceeding. On this principle, it can properly be held that a judgment against a person who was *non compos mentis* at the time of the trial, and yet was not represented by a legal guardian, is not to be impeached in execution, but should be reversed or annulled in some direct proceeding taken for that purpose. Such a judgment can be attacked, for instance, by way of an application for review to the Court which made it, by way of an appeal or application for revision to a superior tribunal, or by way of a regular suit in a Court of competent jurisdiction; but the Court which made the decree cannot, when called upon to execute it, be invited to hold that the decree was erroneously or improperly made. The case before us is covered completely by the decision of the Judicial Committee in *Rasidunnessa v. Muhammad Ismail* (1). Here the lunatic was never a party to the suit in the proper sense of the term; his wife, though appointed the manager of his estate under Act XXXV of 1858, was herself a minor, and was thus disqualified to act as his next friend in the suit. The lunatic was, in the words of Sir Andrew Scoble, never a party to the suit in the proper sense of the term, and, consequently, the question now raised is not a question which arises between the parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. The appellant has contended that this view is likely to lead to lamentable results; that if the decree is allowed to be executed, the purchaser will acquire no title, and that much mischievous litigation will as a consequence follow. We appreciate the force of this contention; at the same time, there is no answer to the argument of the respondent that if the decree is directly challenged, as it should be, in an appropriate proceeding, the Court will no doubt remodel the decree in accordance with O. XXXII, rule 2 read with rule 15 [*Geereeballa v. Chunder Kant* (2); *Devkabai v. Jefferson* (3)], and, thus safeguard his just rights, while if the objection to execution prevails, he will be left without a remedy. We are of opinion that the safest course to follow is to adhere rigidly to the established principle that every order and

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(1) (1909) L. R. 36 I. A. 168.

(2) (1885) I. L. R. 11 Calc. 213.

(3) (1886) I. L. R. 10 Bom. 248.

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judgment, however erroneous, is, in the words of Lord Cottonham in *Chuck v. Cremer* (1) good, until discharged or declared inoperative, and that the execution Court cannot enquire into the validity or propriety of the decree. This, no doubt, assumes that there is a valid decree in existence, that is, an adjudication by a Court of justice, a decree or order which has not ceased to be operative and is capable of execution.

The result is that the order of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing-fee at two gold mohurs.

A. T. M.

*Appeal dismissed.*

(1) (1846) 2 Phil. 113 (115); 1. C. P. Cooper 338 (342).

## SPECIAL BENCH.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge, Sir Charles Chitty, Knight, Judge, Mr. Justice Teunon and Mr. Justice Chaudhuri.*

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July, 26 and  
August, 29

### IN THE MATTER OF REGINA GUHA.\*

*Legal Practitioners—Women—Administration of Justice Regulation 1781, Secs. 46, 84—Regulation VII of 1793, Preamble, Secs. 2, 5—Regulation XXVII of 1814, Preamble, Secs. 3-5, 10-14, 18, 20-22, 30, 35, 37—Act I of 1846, Secs. 4, 12—Act XVIII of 1852—Act XX of 1853—Act II of 1857 (Calcutta University)—Act XLV of 1860 (Penal Code), Sec. 8—Act X of 1865 (Succession Act), Sec. 3—Act XI of 1865 (Small Cause Courts), Sec. 1—Act XX of 1865 (Pleaders) Secs. 2, 4, 5—Act XXIII of 1865 (Punjab Chief Courts), Sec. 1—Act XXIX of 1865—Legal Practitioners Act (XVII of 1879), Sec. 6—Statutes, interpretation of—Number—Gender—General Clauses Act (I of 1868), Sec. 2 (i), (ii)—General Clauses Act (X of 1897), Sec. 13—Statutory rules, construction of—General Rules of the High Court, Part I. Ch. XI, rules 18, 27—Solicitor's Act, 1843 (6 and 7 Vict. C. 73), Sec. 48.*

Under the Statute law of British India a woman though otherwise qualified, is not entitled to be enrolled as a legal practitioner.

Application by Miss. Regina Guha, M.A., B.L. for enrolment as a pleader in the District Court of 24-Perganas.

\* Application under Rule 18 of the Rules framed under section 6 of the Legal Practitioners Act,

*Messrs. Eardly Norton, P. K. Majumdar, M. N. Kanjilal and Babu Manmatha Nath Mukherji* for the Applicant.

*Sir S. P. Sinha*, Advocate-General represented the Bar.

*Babu Ram Churn Mitra*, Senior Government Pleader represented the Vakils.

The arguments are fully set out in the judgments.

C. A. V.

The following judgments were delivered :

**Sanderson, C. J.**—This matter comes before this Court upon a petition of Miss. Regina Guha.

*August, 20.*

The circumstances are set out therein as follows :—

1. "That your petitioner obtained the Degree of the Bachelor of Law of the University of Calcutta in the year 1916."

2. "That your petitioner desiring to be admitted to practise as a pleader in the District of 24-Perganas paid into the Government Treasury of the said District the fee prescribed by Rule 27 of the Rules framed by the Hon'ble High Court under the Legal Practitioners Act and also presented her diploma, the receipt for the said fee and a stamp paper of necessary value of her first certificate to practise to the learned District Judge of 24-Pergannas together with the necessary application for admission."

3. "That the learned District Judge of 24-Perganas by a memorandum, dated the 3rd April 1916, forwarded the said application to the Hon'ble High Court for orders as to your petitioner's enrolment."

4. "That about the 16th of June 1916, your petitioner received a memorandum from the learned District Judge being Memorandum No. 912, dated 15th June 1916, forwarding for her information a copy of the communication addressed to him by the Registrar of the Appellate Side of the said Hon'ble Court. The said memorandum is annexed hereunto and marked with the letter "A"."

5. "That your petitioner accordingly begs humbly to move your Lordships and prays that in view of the fact that she is a person duly qualified under the Rules to be entitled to enrolment as a Pleader, your Lordships may be graciously pleased to order her to be enrolled as such or pass such other necessary orders as to your Lordships may seem fit and proper." In consequence of the petition this Court was formed for the purpose of hearing this application argued and deciding in a judicial capacity what the law relating to the application is. As it is a matter of considerable importance

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both to the public and the legal profession I directed that notice should be given to the Advocate General and the Senior Government Pleader so that we might have the benefit of their assistance. It should be clearly understood that it is not the function of the Court to express any opinion as to whether it is desirable that women should be admitted as Pleaders in the Courts subordinate to the High Court and that this Court was formed merely for the purpose of deciding the question in a judicial capacity.

The question depends upon the true construction of the Legal Practitioners Act (XVIII of 1879) section 6 and the Rules made by the High Court in pursuance thereof.

It was argued by learned Counsel for the applicant (1) that the words used in the said section are large enough to include both sexes and consequently that women are not excluded.

(2) That the Rules do not exclude women.

(3) That if the Rules do exclude women the Rules are *ultra vires*.

Chapter XI, Part I of the General Rules of the High Court contains the Rules as to the qualification, admission and certificates etc. of Pleaders and Muktears in Courts Subordinate to the High Court framed under clauses (a), (b), (c) and (d) of section 6 of Act XVIII of 1879 and rules 3 to 6 inclusive are the rules directly in point in this matter. The applicant has obtained the Degree of Bachelor of Law at the University of Calcutta, one of the qualifications specified in Rule 3 and has made her application within a year as provided by the said Rule.

The first question is what is the proper construction to be placed on section 6 of the Legal Practitioners Act 1879. The language used in section 7 and following sections, such as the words "him" and "his" point to an intention of the Legislature that it was a male person only who could be admitted a pleader of the Subordinate Courts, but by the General Clauses Act of 1868 (No. I of 1868) section 2 it was provided that in all Acts made by the Governor General of India in Council after that Act should have come into operation, unless there was something repugnant in the subject or context, words importing the masculine gender should be taken to include females: so that the use of the language above referred to in the Act of 1879 is not conclusive.

It is necessary therefore to consider what was the subject with which the Legislature was dealing and what was the position of affairs relating to the profession of pleaders at the time the Legal

Practitioners Act of 1879 was passed. It is clear that the Legislature was dealing with a profession which was well known and which had been established for a long time.

A summary of the Regulations, setting forth the origin of the profession of the pleaders in Bengal and the reason for their appointment is to be found in Harrington's Analysis Vol. I., p. 147.

The first regulation dealing with this matter was Regulation VII of 1793, the preamble to which after referring to the unsatisfactory state of affairs with regard to the practice in the Courts provided that "it is therefore indispensably necessary for enabling the Courts duly to administer and the suitors to obtain justice that the pleading of causes should be made a distinct profession and that no persons should be admitted to plead in the Courts but *men* of character and education versed in the Mahomedan or Hindu Law and in the Regulations passed by the British Government and that they should be subjected to rules and restrictions calculated to secure to their clients a diligent and faithful discharge of their trusts." This was the origin of the "profession" of pleaders as recognised by the Law and it is to be noted that the pleaders were to be chosen from "*men*" of character and education and that they were to be Mahomedans or Hindus.

The Regulation by its various clauses provided for the appointment and selection of pleaders.

Clause II. "The Sudder Dewanny Adawlat is empowered to appoint, from time to time, such a number of pleaders of the Mahomedan or Hindu persuasion, as may appear to them necessary to plead the causes of the parties in suits in the Sudder Dewanny Adawlat, the Provincial Courts of Appeal and the Courts of Dewanny Adawlat in the several Zillahs and the cities of Patna, Dacca and Moorshidabad."

Clause V. "The pleaders are to be selected from amongst the students in the Mahomedan College at Calcutta and the Hindoo College at Benares, who may be qualified and be desirous of being admitted to plead in any of the Courts. If the Colleges shall not furnish a sufficient number of pleaders, the Sudder Dewanny Adawlat is to admit any other persons, provided they be Mahomedans or Hindoos, previously however ascertaining that they are men of good character and liberal education and giving a preference, in all cases, to persons of this description who have been bred to the study of the Hindoo or Mahomedan Law."

Various regulations were subsequently passed. To these I need not refer. In 1814, however, Regulation XXVII was made for the purpose of reducing into one Regulation with amendments and modifi-

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cations the several Rules which had been passed regarding the office of Vakil or native Pleaders in the Courts of Civil Judicature.

"Whereas it has been deemed expedient to transfer to the provincial Courts the control now exercised by the Sudder Dewanny Adawlut in the appointment and removal of vakeels or native pleaders in the zilla and city Courts and in the provincial Courts, and whereas the speedy adjustment of disputes may be facilitated by empowering the authorised vakeels to receive certain fees for legal opinions furnished by them and by vesting them with authority to act as arbitrators under the General Regulations, and whereas it will contribute to the public convenience to reduce into one Regulation, with amendments and modifications, the whole of the provisions which will be applicable to the office of vakeel or native pleader, the following Rules have been passed by the Governor General in Council, to be in force from the 1st of February 1815, throughout the whole of the provinces immediately subject to the Presidency of Fort William." Clause 3(1):—"The Sudder Dawanny Adawlut and the several Provincial Courts are empowered to appoint to the office of vakeel in their respective Courts, such a number of persons being natives of India and duly qualified for the situation as may from time to time appear to them necessary." Clause 3(3).—"In the nomination and appointment of persons to the office of vakeel the Judges of the Sudder Dewanny Adawlut, of the several provincial Courts, and of the zilla and city Courts, are restricted to individuals of the Hindu and Mahomedan persuasion and are required to give preference to candidates who may have been educated in any of the Mahomedan or Hindoo Colleges established or supported by Government provided that such candidates are in other respects duly qualified for the situation."

By Act I of 1846 it was enacted that clause iii, section 3 of Regulation XXVII of 1814 should be repealed and by section 4 it was provided as follows:—

Clause 4 :—And it is hereby enacted that "the office of Pleader in the Courts of the East Indian Company shall be open to all persons of whatever nation or religion, provided that no person shall be admitted a pleader in any of those Courts unless he have obtained a certificate in such manner as shall be directed by the Sudder Courts that he is of good character and duly qualified for the office, any Law or Regulation to the contrary notwithstanding."

By this clause the restriction that a pleader must be a Mahomedan or a Hindoo was removed and the office of pleader was thrown open to all persons of whatever nation or religion.

It is to be noted that the word "persons" is used in this section, but from the context it is clear that male persons were referred to.

By Act XX of 1865 so much of Regulation XXVII of 1814 as had not already been repealed was thereby repealed and by section 4 it was provided as follows :—

"The High Court is hereby authorised and required within six months after this Act shall take effect in the territories in which such Court exercises jurisdiction, to make rules for the qualification, admission and enrolment of proper persons to be pleaders and Muktears of the Courts in such Territories for the fees to be paid for the examination, admission and enrolment of such persons and subject to the provisions hereinafter contained for the suspension and dismissal of the Pleadors and Muktears so admitted and enrolled. The High Court may also from time to time vary and add to such rules."

By this section the High Court is the authority to make Rules and the persons to be admitted are "proper persons," the same words as then used in the Legal Practitioners Act of 1879.

Section 5 provides as follows :—

"Except as hereinafter provided, no person shall appear plead or act as a Pleader, or appear or act as a Muktear in any Court to which this Act extends, unless he shall have been admitted and enrolled and shall be otherwise duly qualified to practise as a Pleader or as a Muktear as the case may be, pursuant to the provisions of this Act and unless he shall continue to be so qualified and enrolled at the time of his practising as a Pleader or Muktear as aforesaid: Provided that every person who at the time at which this Act shall come into operation in any part of British India shall be or shall be qualified to act as a Pleader in any Court in such part by virtue of any law, rule or order in force therein shall be entitled to be admitted and enrolled as a Pleader in the High Court pursuant to the provisions of this Act, without passing any examination but subject to the conditions of any certificate or diploma held by him as to the class of Courts in which such certificate or diploma authorises him to practise..." It is evident from the language used that the Legislature contemplated the admission of male persons only as Pleadors. This is corroborated by the fact that although section 2 provides that words importing the singular shall include the plural etc.,.....and Pleader includes Vakils, there is no mention that words importing the masculine gender should include females.

In my judgment it is clear that the intention of the Legislature was to deal with a recognised existing profession, viz, that of

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Pleaders, which up to that time was constituted of men only, and to which men only could belong.

In 1868 the first General Clauses Act, already referred to, was passed and it was not retrospective.

In 1879 the Legal Practitioners Act was passed. It repealed Act XX of 1865 and it is the Act which is now applicable to this matter.

Reading the sections without reference to the General Clauses Act of 1868, they obviously contemplate the admission of a male person only: and the pre-existing disability of women to be admitted as Pleaders was not removed by that Act. The question remains whether by reason of the application of the aforesaid provisions of the General Clauses Act to the Act of 1879 the Legislature intended to remove the above-mentioned pre-existing disability.

The subject matter of the legislation then under consideration was the long-established and well-recognised profession of Pleaders, which had consisted for over 80 years of men only, and in respect of which it was admitted that no woman had ever yet applied for admission as a Pleader.

It is true that the Legislation of the past had been to some extent progressive, but only in the direction of removing the restrictions as to the qualifications of men.

The provisions of the 1879 Act upon the matters which are material to this question, were practically a re-enactment of Act XX of 1865 and I cannot think that the Legislature in 1879 intended to make such a radical change in the constitution of the profession of Pleaders as would be caused by the admission of women merely by the application to the 1879 Act of the provisions of the General Clauses Act of 1868. Further having regard to the constitution of the profession of Pleaders, existing at the date of the passing of the 1879 Act and to the fact that the whole trend of legislation for a long time had been to confine the profession to men, in my judgment both the subject matter of the legislation and the context are repugnant to a construction of the Act which would include females.

In my judgment it could not be intended that such a disability as above-mentioned should be removed by a mere interpretation clause. This opinion is confirmed by the decision in *Bebb v. Law Society* (1): There the disability arose from the Common Law of England, and it was held that the disability could not be removed, even though the Act which was under consideration, itself contained an

interpretation clause similar to the one in the General Clauses Act, 1868.

In view of the above conclusion, it is not necessary to consider the question as to the applicability of the Common Law of England to this question. I need only mention the reference to it made by the learned Advocate General, viz. that the Common Law of England obtains in Calcutta and if this is to be taken as a material factor in the construction of the Legal Practitioners Act 1879 the result might be that there would be a disability upon women in Calcutta and none in the Mofussil, a result which could not have been intended by the Legislature.

The Rules of the High Court in my judgment clearly contemplate the admission of men only as Pleaders in the Subordinate Courts, and in view of the conclusion I have arrived at as to the constructions of the Legal Practitioners Act of 1879 the Rules were made in accordance with and for the purpose of carrying out the intention of that Act and are not *ultra vires*.

In my judgment therefore the answer to be given to the application must be that as the law now stands Miss Regina Guha is not entitled to be enrolled as a Pleader of the Subordinate Courts.

We have only to determine what the law is, and if there is to be any change, it is one which must be effected by the Legislature.

**Mookerjee J.**—This is an application by Miss Regina Guha for enrolment as a pleader in one of the courts Subordinate to this court, under the Rules framed in conformity with section 6 of the Legal Practitioners Act, 1879. As this is the first instance of an application by a lady for enrolment as a pleader, her application has been heard by a Special Bench for judicial determination of the question, whether the Legal Practitioners Act contemplates women practitioners. Three questions, consequently, require consideration, namely, *first*, does the Legal Practitioners Act contemplate women practitioners; *secondly*, if the Legal Practitioners Act contemplates women practitioners, has the High Court by its Rules excluded them; and, *thirdly*, if the Rules exclude them, are the Rules *ultra vires*. The applicant contends that as she has been admitted to the Degree of Bachelor of Law by the University of Calcutta, she is qualified for enrolment under the Rules, although the Rules refer in terms to male persons. She relies upon the well-known principle of construction embodied in section 13 of the General Clauses Act, 1897, that "in all Acts of the Governor-General in Council and Regulations, unless there is anything repugnant in the subject or context, words importing the masculine gender shall

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be taken to include females." A provision similar to this, it may be observed, found a place in section 2, clause (1) of the General Clauses Act, 1868: "In this Act, and in all Acts made by the Governor-General of India in Council *after this Act shall have come into operation*—unless there be something repugnant to the subject or context—words importing the masculine gender shall be taken to include females." This rule of interpretation is not of direct assistance to the petitioner, unless its operation be extended to the construction of Statutory rules. Assume that such extended application is legitimate; still the question remains, whether there is something repugnant in the subject so as to exclude the proposed interpretation. There is thus no escape from the problem, does the Legal Practitioners Act contemplate the existence of women practitioners.

The Preamble to the Legal Practitioners Act as also the language used in section 6 make it plain, what indeed is well-known, that the profession of pleaders was not created by the Legal Practitioners Act. The earliest Regulation on the subject, passed by the Governor-General in Council as a Legislative Body, was made on the 1st May 1793 and is known as "A Regulation for the appointment of Vakils or native pleaders in the Courts of Civil Judicature in the Provinces of Bengal, Behar and Orissa" (Regulation VII of 1793). The Preamble shows that even before the Regulation was made, there was a profession of Vakils in the Courts of Civil Judicature in the British Territories in Bengal, "*men* who followed the business of a Vakil to obtain a livelihood and appeared in the Courts of Justice or wherever the concerns of their constituents required their attendance." This is made manifest by an examination of the Regulations for the Administration of Justice made by the Governor General in Council between the 21st August 1772 and the 23rd November 1792 and collected by James Edward Colebrooke in his Supplement to the Digest of the Regulations and Laws (1807); to take one illustration only, reference may be made to sections 46 and 84 of the Regulation for the Administration of Justice passed in Council on the 5th July 1781; these recognise the existence of Vakils, and the context shows that *men* alone at that time constituted the profession. The Preamble to Regulation VII of 1793 describes in vivid terms the mode in which these men discharged their duties, their ignorance of the Laws and Regulations, their lack of regularity and diligence, and their disregard of the interests of their clients. The Preamble then proceeds to formulate the necessity for the constitution of a distinct profession and the advantages to the public likely to result from the adoption

of such a step : "it is, therefore, indispensably necessary for enabling the Courts duly to administer and the suitors to obtain justice, that the pleading of causes should be made a distinct profession ; and that no persons should be admitted to plead in the Courts but *men* of character and education versed in the Mahomedan or Hindu Law and in the Regulations passed by the British Government ; and that they should be subjected to rules and restrictions calculated to secure to their clients a diligent and faithful discharge of their trusts." Later on, the Preamble states that in order that "*men* of education and respectable character may be solicitous to be admitted as Pleaders in the Courts, their appointments ought to be secured to them as long as they conform to the Regulations under which they act." It is beyond controversy, as appears from the language used in the Preamble to the Regulation and throughout the various provisions thereof, that the Indian Legislature, in 1793, contemplated the admission of *men* alone as what is described in the Regulation as "public pleaders." This was obviously natural ; the legislators themselves had been brought up in a system which knew not women Legal Practitioners, and the circumstances of the country intended to be benefited by their legislation rendered it impossible for them to imagine that women could appear in Courts of Justice as "public pleaders." This Regulation was repealed and replaced by Reg. XXVII of 1814 passed on the 29th November, 1814, "for reducing into one Regulation, with amendments and modifications, the several rules which have been passed regarding the office of Vakil or native pleader in the Courts of Civil Judicature." The preamble enumerates the changes which were intended to be effected in the pre-existing law on the subject, and it is sufficient for our present purpose to state that there is not the remotest indication of an intention to effect a departure of so fundamental a character as the admission of women into the rank of Legal Practitioners. On the other hand, we find that throughout the Regulation, language is repeatedly used which is appropriate to *men* only as legal practitioners [see, for instances, sections 4, 5, 10, 11, 12, 13, 14, 18, 20, 21, 22, 30, 35, 37]. This Regulation, however, introduced, by section 3, sub-section 3, the restriction that pleaders were to be either of the Hindu or Mahomedan religion and that preference was to be given to candidates who might have been educated in any of the Mahomedan or Hindu Colleges established or supported by Government. This restriction was removed by an Act passed on the 7th January, 1846, (Act I of 1846), the fourth section whereof laid down that the office of pleader in the Courts of the East India Company shall be open

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to all persons of whatever nation or religion, provided that no person shall be admitted as a pleader in any of those Courts, unless *he* have obtained a certificate, in such manner as shall be directed by the Sudder Courts, that *he* is of good character and duly qualified for the office. Here, again, there is no indication that women might be legal practitioners; while section 12, like section 4, uses language appropriate only to *men* practitioners. Before I pass on to the next stage, I may mention that the history of the institution of a legal profession in the Courts of East India Company is lucidly set out in the great work on the Bengal Regulations by John Herbert Harington, for many years Chief Judge of the Sudder Court (See Vol. I., 1st Edition, page 147, which states the law as in 1809, and Vol. I., 2nd Edition, page 148, which states the law as it stood in 1821). The next legislation on the subject was in 1865, when Act XX of 1865 came into force on the 10th April, 1865. Regulation XXVII of 1814, in so far as it had not been already repealed, as also Act I of 1846, Act XVIII of 1852 and Act XX of 1853 were repealed; it may be stated parenthetically that the language used in those two Acts show that the Legislature contemplated men alone as legal practitioners. There is no indication whatever in Act XX of 1865 that the Legislature had in view a departure from what had unquestionably been the law from before 1793. On the other hand, section 5 and the form of certificate to be granted to pleaders as contained in the second schedule, make it manifest that in 1865, as in 1793, the Legislature contemplated *men* alone as Legal Practitioners. It is further worthy of note that this Act contains an interpretation clause; section 2 enacts that, unless there is something repugnant or inconsistent in the subject or context, words in the Act importing the singular number include the plural and words importing the plural number include the singular. This corresponds with what was subsequently enacted in section 2 (2) of the General Clauses Act (I of 1868); but we miss in Act XX of 1865 what does find a place in section 2 (1) of Act I of 1868, namely, the provision that words importing the masculine gender shall be taken to include females. The omission becomes significant, when we find that in the Indian Penal Code (Act XLV of 1860), enacted on the 6th October, 1860, the Legislature had in section 8 stated that the pronoun "he" and its derivatives are used of any person, whether male or female. The inference is legitimate that if the Legislature in 1865 had contemplated the admission of women as legal practitioners, they would have inserted in the interpretation clause, a provision about gender as they did in 1860 in the case of the Indian

Penal Code. It is not as if they were oblivious of this point. Take, for instance, Act XI of 1865 (Mofassil Small Cause Courts Act) which came into force on the 15th March, 1865, that is, less than a month before the Pleadings Act 1865, came into operation; we find in the interpretation clause (section 1) a provision that "words importing the masculine gender include females." Take, again, Act X of 1865, (the Indian Succession Act) which came into force on the 16th March, 1865, that is, after the Small Cause Courts Act but before the Pleadings Act; we find, in the interpretation clause (section 3), a provision that words importing the male sex include females. This occurs along with a provision about number, which re-appears in the Small Cause Courts Act and in the Pleadings Act; the provision about gender, as we have seen, re-appears in the Small Cause Courts Act, but not in the Pleadings Act. It thus looks as if the provision about gender had been deliberately omitted from the Pleadings Act. The contrast is emphasised when we take another Act passed a few days later on the 17th April 1865, namely, Act XXIII of 1865, (Punjab Chief Court of Judicature Act), where, in the interpretation clause (section 1), we find provisions about both number and gender. The position, then, is that in 1865, when there was no interpretation statute, when the Legislature used to insert interpretation clauses in various Acts, we find that in Acts made immediately before and after the Pleadings Act, words indicative of the male sex are expressly stated to include female sex, but there is no such provision in the Pleadings Act; the inference seems almost conclusive that the omission was intentional, and this conclusion is substantially strengthened when we find that from 1772 onwards men alone as legal practitioners were in the contemplation of the legislators; and although the Pleadings Act was amended on the 22nd December, 1865 by Act XXIX of 1865, no change was made in this direction. The Pleadings Act, 1865 was, as we have already seen, repealed by the Legal Practitioners Act, 1879, which was passed on the 29th October, 1879. Neither the Preamble nor the provisions of any of the sections of the Act afford any indication of an intention on the part of the Legislature to widen the profession of pleaders by the admission of women into its ranks. I do not overlook the fact that the Act of Incorporation of the University of Calcutta, (Act II of 1857) which came into force on the 24th January, 1857, authorised the Senate to confer Degrees in various faculties inclusive of the faculty of Law, and, that, notwithstanding the absence of an interpretation clause, the Act of Incorporation has been interpreted to authorise the University to grant Degrees

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to men as well as to women in all faculties. There may obviously be weighty reasons why in the University Act words importing the masculine gender may be taken to include females, while in the Pleaders Act no such intention can reasonably be attributed to the Legislature; the subject matters of the two Statutes and the historical antecedents thereof are fundamentally different. For the reasons stated, I see no escape from the position that the Legislature in this country never contemplated the admission of women to the rank of legal practitioners.

Reference was made in the course of argument to the fact that under the Common Law of England, women were under a disability to become attorneys or solicitors, and that the disability continued, notwithstanding the interpretation clause (section 48) of the Solicitors Act, 1843, which provides that words importing the masculine gender shall extend to a female: *Bebb v. Law Society* (1). The decision just mentioned, no doubt, does not directly assist us in the solution of the question we have to determine; but I think it furnishes valuable aid as to the mode in which the problem should be approached. Cozens Hardy, M. R. referred to Lord Coke (Co. Litt. 128a) to show that women were not allowed to be attorneys, and Lord Coke in his turn relied upon the Mirror of Justices (Book II, Chap. 31, Selden Society's Ed p. 88; Robinson's Ed., p. 137) to show that "the law will not suffer women to be attorneys." The master of the Rolls then observed that no woman had ever been an Attorney-at-law or had applied to be or attempted to be an attorney-at-law. The Solicitors Act, 1843 did not, in express terms, destroy a pre-existing disability or confer a fresh and independent right; consequently, notwithstanding the interpretation clause in the Solicitors Act, 1843, which had to be construed with the previous legislation and the common law, it could not be successfully maintained that the Legislature had departed from what had been the constant practice and inveterate usage. [See also the judgment of Willes J. in *Charlton v. Lings* (2); 2 Co. Litt 119 (121); 3 Blackstone Comm. 362, 4 Blackstone Comm. 395.] The line of argument which was unsuccessfully adopted in the case of *Bebb v. Law Society* (1), has sometimes found favour in the Courts of the United States, but, has been on other occasions, emphatically repudiated. It is not necessary for my present purpose to review in detail the conflicting principles applied in the different Courts of the United States in the determination of this question; but an examination of their decisions, which are by no means harmonious, discloses that the

(1) (1914) 1 Ch. 286.

(2) (1868) L. R 4 C. P. 390.

same difficulty has been felt there as elsewhere, as to the inference properly deducible from the circumstance that women have not hitherto entered the rank of the legal profession. In favour of allowing women to practice law under old Statutes which mentioned men only, the Courts have reasoned, *first*, that every word importing the masculine gender only, may extend to and be applied to females [*In re Thomas* (1)] ; *secondly*, that Statutes, whenever they might have been passed, should be construed as if they were recently enacted, and not with reference to what was in the mind of the Legislature at the time of their enactment [*In re Hall* (2)] ; *thirdly*, that all Statutes are to be construed, as far as possible, in favour of equality of rights, and that all restrictions upon human liberty and all claims for special privileges are to be regarded as having a presumption of law against them [*In re Leach* (3) ; *In re Hall* (2)] and *fourthly*, that the status of women has, in the eye of law and in popular acceptance, so changed as not only to permit their admission to the Bar but practically to demand it [*In re Thomas* (1) *In re Hall* (2)]. In refusing to admit women to practise law, the reasoning employed is substantially the opposite of that which favours their admission to the Bar, namely, *first*, that words importing the masculine gender cannot be read so as to include women, unless the subject matter and the context justify such a construction [*In re Maddox* (4)] ; *secondly*, that, as the Legislature never contemplated the admission of women, as indicated by the history of the profession, words of masculine gender in the Statutes should not be interpreted to include women [*In re Robinson* (5) ; *In re Leonard* (6) ; *In re Goodell* (7)] ; *thirdly*, that an extended interpretation should not be put on statutes because women are generally unfitted for the duties of the legal profession [*In re Bradwell* (8) ; *In re Lockwood v. U. S.* (9)] ; and, *fourthly*, that if the status of women has altered in the eye of law and in popular acceptance, the proper remedy is legislation and not an alteration of the law in the disguise of judicial exposition of the existing law [*In re Maddox* (4) ; *In re Robinson* (5) ; *In re Leonard* (6) ; *In re Bradwell* (8) ; *Ex parte Griffin* (10)]. The most

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(1) (1891) 16 Colo 441 ; 13 L. R. A. 528.

(2) (1882) 50 Conn. 131 ; 47 Am. Rep. 625.

(3) (1893) 134 Ind. 665 (671) ; 21 L. R. A. 701.

(4) (1901) 93 Maryland 727 ; 55 L. R. A. 298.

(5) (1880) 131 Mass 376 ; 41 Am. Rep. 239.

(6) (1885) 12 Oregon 93 ; 53 Am. Rep. 323.

(7) (1875) 39 Wisconsin 232 ; 20 Am. Rep. 42. (8) (1870) 55 Ill. 535.

(9) (1873) 9 Ct. Cl. 346.

(10) (1901) 71 S. W. 746.



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powerful opinion in the Courts of the United States against the construction of a Statute in terms applicable to men only, so as to confer a new privilege upon women, is that of Chief Justice Gray in *In re Robinson* (1), where he emphasised the impropriety of an extended construction of a Statute in the absence of all indications of an intention on the part of the Legislature to reverse the policy of their predecessors or to introduce a fundamental change in long established principles of law. To the same effect are the weighty words of Lawrence, J. in *In re Bradwell* (2): "female Attorneys-at-law were unknown in England, and a proposition that a woman should enter the Courts of Westminster Hall in that capacity or as a Barrister would have created hardly less astonishment than one that she should ascend the Bench of Bishops or be elected to a seat in the House of Commons. If it is maintained that a change of so radical a character has been effected in the law, it must be shown that there is express legislation to that effect" [See also *Bradwell v. Illinois* (3), and *In re Lockwood* (4), where the Supreme Court of the United States held that in view of the familiar history of the constitution of the profession, the term "person" or "citizen" in a Statute relating to the enrolment of Attorneys and Counsellors-at-law could not be deemed to include a woman]. The question was elaborately discussed recently by a Full Bench of the Supreme Court of New Brunswick in the case of *Re French* (5), and the Court came unanimously to the conclusion that statutory authority in express terms is necessary to enable a woman to be admitted to the ranks of the profession; in other words, that the intention of the Legislature to make a radical change must be made out beyond doubt.

It will be noticed that Swinfen Eadey, L.J. in his judgment in the case of *Bebb v. Law Society* (6), applied to the matter before him the following passage from the speech of Lord Loreburn, L.C. in *Nairu v. St. Andrews University* (7): "Not only has it been the constant tradition, alike of all the three kingdoms, but it has also been the constant practice, so far as we have knowledge, of what has happened from the earliest times down to this day; only the clearest proof that a different state of things prevailed in ancient times could be entertained by a Court of Law in proving the origin of so inveterate an usage." It is interesting to investigate the matter from the point of view thus indicated. We have seen that ever since the foundation of British Courts in this country in 1772, women have never been

(1) (1880) 131 Mass. 376; 41 Am. Rep. 239. (2) (1870) 55 Ill. 535 (539).

(3) (1872) 16 Wallace 130.

(4) (1893) 154 U. S. 116.

(5) (1905) 37 New. Bruns. 359.

(6) (1914) 1 Ch. 286 (296).

(7) (1909) App. Cas. 147 (160).

admitted to the rank of legal practitioners. It is by no means easy to determine with absolute certainty whether women were recognised as legal practitioners in Hindu or Mahomedan Courts in this country. As regards Hindu Courts, it is clear that the legal profession existed in the Seventh Century of the Christian Era when Asahaya wrote his commentary on the Institutes of Narada. [See the edition of Narada Smriti edited by Joly for the Bibliotheca Indica Series Book I, verse 6, page 48 ; Sacred Books of the East Series, Vol. XXXIII, page 43 ; see also Introduction, sec. II Verse 22 ; S. B. E. Vol. XXXIII page 29.] To the same effect are texts of Vrihaspati, Katyayana and Vyasa quoted by Raghunandan in his Vyavahara Tatwa. It is also fairly clear from Buddhistic books that the profession of lawyers existed in the first century before the christian era ; they were known as "sellers of law" or "traders in law" who "explained and re-explained, argued and re-argued." (Milinda Panho Book V. 23 ; Trenckner's Edition pp. 344-345 ; translation by Rhys Davids, Sacred Books of the East, Vol. XXXVI, pages 236-238). There are also references to pleaders in the Dhammathats or the Laws of Menoo (Richardson's Laws of Menoo p. 50). Similarly, the Sukraniti (IV. 5, 10, 13, 26, 80-82) mentions pleaders. It is remarkable that wherever pleaders or advocates are so mentioned, the reference is to *men* and not to women. I cannot find any instance where in Hindu or Buddhistic times, the Jurists contemplated the possibility of women as members of the legal profession. As regards the Courts in Muhammadan times in this country, I have not been able to obtain any information. But I am not unmindful that there are indications that the legal position of women under the Islamic Law as administered in countries beyond India, was based on very advanced conceptions. Thus, Syed Ameer Ali observes, in his lecture on the Legal position of women in Islam (Page 21), that Abu Hanifa, the founder of the Hanifa School of Mussalman Law had declared in the eighth century of the christian era that a woman was entitled to hold the office of Judge or Kazi equally with a man. Al Suyuti in his History of the Caliphs (Tarikh-al-Khalafa, p. 391) states that Sha'ab or Shaghab, the mother of the Abbasid Caliph Al-Muqtadir (295 A. H. = 907 A. D.) herself presided at the High Court of Appeal, listened to applications, surrounded by Qadis and Dignitaries of State, and issued edicts in her own writing. In the celebrated Maqamat or Assemblies of Al Hariai (Assembly IX tr. Chenery and Assembly XL tr. Steingass, both in the Oriental Translation Fund, New Series), we find instances of women litigants appearing before Qadis and holding their own against their husbands

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or other male adversaries (See also *Kitab-al-Adhkiya* of Ibn-al-Jawzi published in Cairo, which records many instances of women litigants appearing before Caliph Omar, Abu Hanifa, and other eminent doctors of Muhammadan Jurisprudence). Even in Islam, however, there have been rifts, and the author of the well-known work *Al-Ashbah Wa'l-Naza'ir* (Analogies and Precedents, Lucknow Edition, page 507) urges that women should not be invested with the office of Qadi, though it may be lawful and valid for her to hold the appointment excepting matters of criminal law. The substance of the matter is that no trace of women legal practitioners can be found in Hindu or Buddhistic times, and though the Islamic Law may have tolerated the appearance of women litigants in Court and possibly the appointment of women as Judges, there is no trace of women legal practitioners in the Courts of this country during the Muhammadan period. When the British Courts were first constituted in 1772, the Rulers found men alone as legal practitioners, and when in 1793, for reasons assigned in the Preamble to Regulation VII, the profession was, as it were, re-organised and given a recognised legal status, the legislators contemplated men alone as members of the profession. There has never been a departure from that policy. It is impossible for us to hold that, on the law as it stands, women are entitled to be admitted to the ranks of the legal profession; when I say this, I do not forget that our duty as Judges of this Court is strictly limited to a declaration of the law as it is; whether any change in that law would be wise or expedient is a question, not for the Court but for the Legislature. In my opinion, there is no possible escape from the conclusion that the application must be refused.

**Chitty J.**—This is an application made by Miss. Regina Guha under Rule 18 of the Rules framed by this Court under section 6 of the Legal Practitioners Act (XVIII of 1879), praying that she may be enrolled as a pleader and permitted to practise as such in the Subordinate Courts of the 24 Perganas. It is conceded that she possesses the necessary qualifications required by the Rules and that she has paid the fees prescribed by Rule 27. The only question is whether, as the law and our rules now stand, a person of the female sex can be admitted as a pleader. We are not here to say what we think the law ought to be, but what it is. Counsel for the petitioner based his argument on the interpretation to be placed on the word "person" and the pronouns following it in the Legal Practitioners Act of 1879. By section 2 (1) of the General Clauses Act I of 1868, which governed the Act of 1879, "words importing

the masculine gender shall be taken to include females." It was argued that by virtue of this provision the word "person" in the Act of 1879 must be taken to mean a person of either sex, the pronouns following and referring to that word, "he," "him," "his," being read as "he" or "she," "him" or "her," "his" or "hers," and so forth. The same argument was used without success in the case of *Bebb v. Law Society* (1), where a lady in England was desirous of being admitted as a solicitor. Section 48 of the Act of 1843, under which she applied, contained a similar provision. It was however pointed out that that section, like section 2 of the General Clauses Act of 1868, is only to be employed, where there is nothing repugnant in the subject or context. It was held in that case that, inasmuch as there had never been a solicitor of the female sex, the Act of 1843, which neither created a new right nor removed an existing disability, did not contemplate such a contingency. So in the case before us the Legal Practitioners Act of 1879 was not framed to create a new profession, but to regulate one which had been in existence for many years. The first Regulation which we find dealing with pleaders as a profession is Regulation VII of 1793. This described them as 'men' and provided that they must be Hindus or Mahomedans. Successive Regulations and Acts were passed, in which no doubt the class of persons eligible was gradually widened and enlarged, but in which there was never any question as to the sex of the profession. Thus we find Regulation XXVII of 1814, Act I of 1846, Act XVIII of 1852, and Act XX of 1865, all dealing with the subject. Before the passing of the General Clauses Act of 1868 it was necessary to have a special section providing that words importing the masculine gender should be taken to include females (e. g. Indian Penal Code Act XLV of 1860, section 8). No such section is to be found in any of the Regulations or Acts above referred to. Although in India in the matter of pleaders we may not be able to go back so far as they did in England in the matter of solicitors, we find that the profession of pleaders has been in existence for over 120 years as a profession, and that never during that period did any woman become enrolled, or, so far as we know, apply to be enrolled as a pleader. We may therefore conclude that in passing the Legal Practitioners Act of 1879 the Legislature did not contemplate the enrolment of pleaders of the female sex, and to read the Act to include females would be certainly repugnant to the subject. I feel some doubt whether the General Clauses Act can apply to Rules framed by this Court. No

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doubt in framing such Rules under an Act of the Legislature the Court should not use any particular expression or word in a different sense to that applied to the particular expression or word by the Act itself. But this does not mean that in framing those Rules the Court must be taken to have framed them for women as well as men. The Rules were framed to meet existing circumstances, that is to say, a profession of pleaders consisting entirely of men, and cannot by implication be read as including pleaders of the opposite sex. It has not been, and indeed could not successfully be, argued that the Rules as they stand are *ultra vires*. As the law stands I am of opinion that a woman cannot be enrolled as a pleader. I therefore agree that the application should be refused.

Teunon J.—I agree in the judgment that has been delivered by the learned Chief Justice and have nothing further to add.

Chaudhuri J.—I also agree in the judgment delivered by the learned Chief Justice and have nothing further to add.

D. K. R., S. C. R. C.

*Application refused.*

## FULL BENCH.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge, Mr. Justice Fletcher, Mr. Justice Teunon and Mr. Justice Chaudhuri.*

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EMPEROR

v.

FATEH CHAND AGARWALLA.\*

*Misdirection—Charge to Jury—Indian Penal Code (Act XLV of 1860), Secs. 27, 243—Possession of spurious coin by the servant—Master's knowledge—Time, moment of—Non-direction to Jury, if misdirection—Judge, statement of—Review under cl. 26 of the Letters Patent—Criminal Procedure Code (Act V of 1898), Sec. 537, if applicable—Whole case, if can be considered on review—Prosecution, duty of.*

\* Full Bench Reference in Application for review under clause 26 of the Letters Patent.

In a case under section 243 of the Indian Penal Code it is necessary to direct the Jury to the effect that they should come to a decision (1) whether the counterfeit coins were in the possession of the accused, or in the possession of his clerk or servant on behalf of the accused; and (2) if they came to the conclusion that the coins were in the possession of the accused, they would then have to decide whether he knew at the time when he became so possessed of them, that the coins were counterfeit; and (3) if they came to the conclusion that the coins were in the possession of the clerk or servant on behalf of the accused, they would then have to decide whether at the time the clerk or servant on behalf of the accused became possessed of the counterfeit coins, the accused himself knew that they were counterfeit.

*Per Mookerjee, J.*—The statement of the Judge who presides at the trial as to what actually took place before him, is conclusive.

*Emperor v. Upendra* (1) referred to.

Mere non-direction is not necessarily misdirection.

*Rex v. Stoddart* (2) referred to.

Section 537 of the Code of Criminal Procedure has no application to a case reviewed under clause 26 of the Letters Patent.

When a point or points of law have been reserved or have been certified by the Advocate General as erroneously decided or as worthy of further consideration, and the Court on review holds on the point of law in favour of the accused, it has been the practice of the Courts to consider the whole case on the evidence and to pass such sentence as shall seem right.

*R. v. Naoroji* (3); *Imperatrix v. Pitambar* (4); *Queen v. Hurribole* (5) and *Queen v. O'Hara* (6) referred to.

*Quere.* Whether these cases have not in effect been overruled by the decision of the Judicial Committee in *Subramanya v. King Emperor* (7).

The duty of the prosecution is, not to secure a conviction, but to assist the Court in arriving at the truth, and for that purpose to place before the Court all the material evidence at its disposal. •

*Ramranjan v. King Emperor* (8); *Amrita Lal v. King Emperor* (9) and *Emperor v. Nagendra* (10) referred to.

Application for review of a Criminal case on the certificate of the Advocate General under clause 26 of the Letters Patent.

The petitioner Fateh Chand was tried at the third Criminal Sessions of 1916 on a charge of offences punishable under section 243 of the Indian Penal Code, and, on the unanimous verdict of

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(1) (1914) 21 C. L. J. 377.

(2) (1909) 2 Cr. App. Rep. 217 (246).

(3) (1872) 9 Bom. H. C. R. 358.

(4) (1877) I. L. R. 2 Bom. 61.

(5) (1876) I. L. R. 1 Calc. 207; 25 W. R. Cr. 36.

(6) (1890) I. L. R. 17 Calc. 642.

(7) (1901) I. L. R. 25 Mad. 61.

(8) (1914) 19 C. W. N. 28.

(9) (1915) 21 C. L. J. 331.

(10) (1915) 21 C. L. J. 396.

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the Jury was convicted and sentenced to undergo rigorous imprisonment. The accused then applied to the Advocate General (*Sir S. P. Sinha*) and obtained the following certificate :—

1. Whereas the accused abovenamed was on the 6th July 1916 charged at the Criminal Sessions holden in this Hon'ble Court in its Original Criminal Jurisdiction before the Honourable Mr. Justice A. Chaudhuri and a common Jury on an indictment as follows :—

*Firstly.*—That he the said Fateh Chand Agarwalla on or about the 20th day of November in the year of our Lord 1915 in Calcutta aforesaid fraudulently or with intent that fraud might be committed had in his possession certain counterfeit coins that is to say 160 counterfeit Rupees being counterfeit of the King's coin having known at the time when he became possessed of them that they were counterfeit and thereby he the said Fateh Chand Agarwalla committed an offence punishable under section 243 of the Indian Penal Code.

*Secondly.*—That he the said Fateh Chand Agarwalla at or about the time and in the place aforesaid fraudulently or with intent that fraud might be committed had in his possession certain counterfeit coins that is to say 3 counterfeit Rupees being counterfeit of the King's coin having known at the time when he became possessed of them that they were counterfeit and thereby he the said Fateh Chand Agarwalla committed an offence punishable under section 243 of the Indian Penal Code.

2. Whereas it has been represented to me that the case for the prosecution as opened by the learned Standing Counsel and as disclosed in the evidence of the prosecution was as follows :—

(a) That on the 26th November 1915 on a search by the Police at a flour shop at Machuabazar Street, Calcutta, belonging to one Soniram Agarwalla thirty-one 1898 (Queen) and other base coins were found and Soniram Agarwalla was arrested.

(b) That upon certain information received from Soniram Agarwalla the shop at No. 24 Armenian Street was raided by the Police at about 10-30 or 11 P. M. on the said 26th November and they found in an iron safe, the key of which was produced by the accused one hundred and sixty counterfeit coins 1898 (Queen) similar to the thirty-one coins found in the shop of Soniram Agarwalla. The police further found three counterfeit coins of the year 1901 (Queen) in a wooden box which was inside the iron safe.

(c) That the one hundred and sixty 1898 (Queen) coins were found in the safe inside a bag mixed up with three hundred and thirty seven genuine Rupees. There were also thirty-seven other genuine

Rupees besides those stated above found in the safe and Currency Notes to the extent of one thousand five hundred and fifty-five Rupees.

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(d) That the Police took charge of the

|        |       |                   |
|--------|-------|-------------------|
| Rupees | 163/  | Counterfeit coins |
| "      | 1555/ | Currency Notes    |
| "      | 337/  | Genuine coins and |
| "      | 37/   | Genuine coins     |

as will appear from a copy of the search list prepared by the Police.

(e) That Mr. Lahiri the Police Officer who raided the shop of the accused and found the counterfeit coins as stated above had already in his possession similar counterfeit coins and he knew the difference between these coins and genuine coins at the time when he found the said coins.

(f) That there were some difference in the Queen's effigies in the milling and in the lettering between the said counterfeit coins and genuine coins but there was very slight difference in weight not ordinarily noticeable no difference in size very slight in sound.

(g) That ordinary business men test the rupee by the sound and that was also the test applied by the Banks.

(h) That Mr. Lahiri saw Books of Account resembling those put in evidence by the defence at the shop at 24 Armenian Street on the night of the 26th November, 1915.

3. Whereas it has been further represented to me that the case for the defence as disclosed in the evidence was as follows :—

(a) That Gunga Shahay the Cashier of the firm of the accused was in charge of the till and cash of the firm. That he used to receive monies and make payments and he was so employed in November 1915.

(b) That large sums of money sometimes amounting to Rupees 5,000 used to be daily received by the firm of the accused.

(c) That the only test applied by the said Gunga Shahay when he received payments to find out if the Rupees were good or counterfeit was to place them in stacks of Rs. 20 or so and then to take up one stack at a time and pour the Rupees from one hand to the other and hear the ring. If he found that the ring of any coin did not satisfy him he returned it to the remitter. He did not examine each coin minutely.

(d) That in the Kutchha Rokur Book of the business of the accused which is daily written up there is an entry dated the 23rd



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November 1915 which went to show that wheat and flour were on that date sold to the firm of Jumunadas Soniram of the value of Rs. 235 or thereabouts. That the said Kutcha Rokur further shows under the date 26th November 1915 that there is an entry showing a cash receipt of Rs. 222 from the firm of Jumunadas Soniram.

(e) That Soniram Agarwalla was the proprietor of the firm of Jumunadas Soniram whose name appears under the two dates in the Kutcha Rokur of the firm of the accused as stated above.

(f) That the said Soniram Agarwalla was the same man in whose shop 31 (1898 Queen) counterfeit rupees were found and who was subsequently convicted of being in possession of counterfeit coins of 1898 (Queen) on 21st February 1916.

(g) That the ledger of the firm of the accused for 1971 Sambat corresponding to 1914 and 1915 contains an account of the said firm of Jumunadas Soniram which shows considerable dealings between the firm of the accused and the said firm in the course of which various sums of money were paid by the firm of Jumunadas Soniram to the firm of the accused.

(h) That the defence was unable to fix from whom they received the 163 counterfeit coins excepting that the firm of the accused received them in the usual course of business. They used to receive a large amount of cash coins in their daily transaction and on the said 26th November 1915 they received cash payment to the extent of about Rs. 790 besides what they already had in the till from the day previous.

4. Whereas it has been further represented to me that no evidence was adduced by the prosecution either before the Committing Magistrate or before the Sessions Court as to how the accused came into possession of the 163 counterfeit coins or whether he had any knowledge at the time when he came into possession of the same that they were counterfeit or that these coins ever actually came into the hands or custody of the accused or that the accused had any subsequent knowledge that the coins were counterfeit or that the accused kept them with any fraudulent intention or that the accused had anything to do whatsoever with the said counterfeit coins beyond what is stated in the preceding paragraphs hereof.

5. Whereas it has been further represented to me that in cross-examination of the defence witness Gunga Shahay a question was put to him to the effect that there was an agreement between Soniram Agarwalla and the accused to pass counterfeit coins which the witness answered in the negative. That this case was not made by the prosecution in their opening or during the examination of their

witnesses. And that Soniram Agarwalla was not called to prove the alleged agreement stated above.

6. Whereas it has been further represented to me that the learned Judge charged the Jury and in such charge which was not taken down completely by Counsel on either side said as follows:—

“Counsel for the defence put too narrow a construction on section 243, Indian Penal Code when he said that the accused must have knowledge at the time when he became possessed of the coins. Knowledge that the coins were counterfeit at the time when he became possessed of the coins was not necessary. It is enough if the accused subsequently became aware of the spurious nature of the coins.”

7. Whereas it has been further represented to me that the learned Judge omitted to draw the attention of the Jury to the following facts and particulars :—

(a) That there was any evidence to prove that the accused had any knowledge either at the time when they were received in his firm or at any other time before the Police raid that the said 163 coins were counterfeit coins or that he kept them with a fraudulent intention.

(b) That there was no evidence of conspiracy or agreement as stated in paragraph 5 hereof.

(c) That the Police found counterfeit coins mixed up with nearly 400 other good coins without any attempt on the part of the accused to keep them separate.

(d) That it was difficult to distinguish the counterfeit from genuine coins because there was very little difference in sound and weight and no difference in size between them.

(e) That Mr. Lahiri had already in his possession similar counterfeit coins before he found those at the shop of the accused and knew actually what their defects were.

(f) That it was not possible or in any case very difficult for the Cashier of the accused who applied the sound test to discover the defects in the coins as pointed out by the expert evidence.

8. Whereas it has also been represented to me that the foreman of the Jury cross-examined the defence witness Chotay Lal on the extent of the business done by the firm of the accused and in the course of such examination said openly in Court that he personally knew that the firm of the accused was a very small one situated in a small shop at Burrabazar and could not do so much business as represented by the witness. And that the accused has been seriously prejudiced by the same, although the learned Judge warned the

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Jury the next day that they should not allow personal knowledge to affect their judgment in the case.

9. And whereas the facts hereinbefore set out has been certified to me by Counsel for the accused as appears from the certificate hereunder written.

Now I, Satyendra Prasanna Sinha, Officiating Advocate General of Bengal, do under and by virtue of the powers entrusted to me by the Letters Patent for the High Court of Judicature at Fort William in Bengal, bearing date the 28th of December 1865 certify that in my judgment whether the direction to the Jury hereinbefore specified was right in law and whether the alleged omissions to direct the Jury do not in law amount to a misdirection should be further considered by the said High Court.

We the undersigned defended the above accused at his trial by the Hon'ble Mr. Justice Chaudhuri presiding at the last Criminal Sessions of the High Court on the 6th and 7th instant and were present at his trial throughout and we certify that the facts hereinbefore set out have been correctly stated to the best of our recollection and belief.

A. P. Sen,

D. N. Basu,

Counsel for the accused.

Before the case came on for hearing before the Full Bench, Mr. Justice Chaudhuri drew up the following note as to what had taken place at the trial before him (a copy of the note was supplied to Counsel for the accused and the Crown).

#### Note by Chaudhuri J.

It was a somewhat long charge lasting over three quarters of an hour. Notes of counsel on page 21 are a short summary. Some of the points do not appear in the order in which I dealt with them and some points of importance, of which I have a distinct recollection, are not there at all. In certain instances, matters, I put hypothetically, have been put in a positive form, as if I had asserted them.

I began in the way put down on page 21. I read section 243 to the Jury. Then I took the important words of the section in the order in which they appear.

*Fraudulent intent*:—I first dealt with the expression "fraudulently or with intent that fraud may be committed." I referred to the definition of "fraudulently" (Section 25 I. P. C.) and said that it was difficult to give a comprehensive definition of fraud, but two

elements had to be borne in mind: First, that there must be an intention to deceive and secondly an actual injury or possibility of injury likely to result therefrom. To pass off a counterfeit coin with knowledge would be fraudulent. That the first portion of the section related to one being fraudulently in possession, and the second part to "being in possession with intent that fraud may be committed." Intention had to be found as a fact from the evidence, from the facts and circumstances proved. Intention may be established by evidence of express declaration of the accused, which was not the present case. It was a matter of inference in this case, such as the coin being found in the current till of the firm, mixed up with good coin. I pointed out that the accused had, according to the evidence, a *bona fide* business. Money was daily coming in and being paid out. Whether the bulk of the counterfeit coin being found mixed up with good coin in the till, led to an inference that the good and bad were going to be used together, was for the Jury.

This portion has almost entirely been missed out in the notes and one part of it is placed at a different place.

*Possession.*—I next referred to the question of Possession, but before dealing with the meaning of the expression in law, I stated the facts, namely that the coin was found inside a safe, in the shop of the accused. The accused produced the key with which it was opened. The defence witness Gunga Sahai the Cashier said the accused obtained the key from him and then made it over to the Police Officer. It had been suggested that the safe was in the Cashier's charge. I then put section 27 I. P. C. to the Jury, and said that the distinction between possession and custody was not important to consider. The law made the possession of the servant on account of the master, the possession of the master. The question of possession therefore was free from difficulty. But bare possession was insufficient, and of no importance, whether constructive or actual. Possession without guilty knowledge or fraudulent intention did not bring the case within the section. By way of illustration I referred to the fact spoken to by the Police officer that he had kept one piece of counterfeit coin for the Police Museum, which was no offence under the section.

*Knowledge.*—I then pointed out that the section laid down certain conditions each one of which had to be shown to exist, before it could be applied against the accused. Possession with knowledge that the coin was counterfeit, was absolutely necessary to prove. Although the servant's possession was in law sufficient on the point of possession, it was very different on the question of knowledge.

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It was not the knowledge of the servant, but that of the accused his master. It may be constructive possession, but it was not constructive knowledge. It must be personal knowledge. I said that the Jury had to decide two matters in this connection :

(1) Had the accused knowledge that he was possessed of counterfeit coin ?

(2) If he had knowledge, did he intend fraudulent use and if so at what time did he so intend ?

I dealt with these two points one after the other. In connection with the first I pointed out that Gunga Sahai the cashier had said that he did not know that any of the coin was counterfeit, that he had shown and told them the way in which he usually received money. It was for the Jury to say whether it was possible to detect the counterfeit coin in that way. Differences had been pointed out by the Mint witnesses. The facts to remember in this connection were that nearly a third of the silver coin was spurious—also their appearance was to be noted, and how they came into their possession. I alluded to an observation made by Mr. Sen for the accused, that he could not have detected the coin as counterfeit, I said it might be due to the fact that members of the Bar although they received large sums of money, without being supposed to take any, never cared to examine them, but this was the case of a Marwari trader. I said that even if they concluded that the cashier knew, they could not attribute his knowledge to the accused. I pointed out that Gunga Sahai had said that he alone handled the cash of the firm ; that Chotaylal said he also did so, in the absence of Gunga Sahai. Both of them said the accused never did. Chotaylal had introduced himself as a partner. Gunga Sahai said that he did not know if the accused had a partner. It may be that Chotaylal had made such a statement to support an argument that when there were two partners, both in law in possession, why should the accused be singled out. That point also had to be considered. In this case the key had come from the accused. He was asked for an explanation and gave it. It was the case of a Marwari firm, in which the accused took an active part. The balance was according to the defence, daily struck and the till compared. A large quantity of spurious coin was found in the safe. They had to consider how it came there. Was it the accumulation of daily receipts or was it recently received. They had to consider whether it was likely that so much had got together from receipts extending over a long period, all coin of the same date and all fresh. The evidence on behalf of the defence suggested that the money had

been received that very day, from Soniram who is said to have paid Rs. 222 as price of articles purchased a few days before. These people had dealings. The Jury had to find upon the evidence whether the accused had actual knowledge or not.

*The time of knowledge in connection with intention.*—The next point was about the time of knowledge in connection with intention. The section says “having known at the time when he became possessed of it.” I thought that Counsel for the defence had put too narrow a construction upon it. I was of opinion that it referred to the time of conscious possession so far as the accused was concerned, that it need not be the time when the servant received the money. I thought that it referred to the time when the master came to know that the coin had been received. The point to consider was, had the accused fraudulent intention at that point of time when he became aware of the possession, became conscious of the possession or had knowledge of it. Such knowledge need not be contemporaneous with the receipt of the coin if the accused did not receive the money, but some one else had received it on his behalf. So to construe, would be to restrict the scope of the section. The essential point was, was the accused fraudulently or with fraudulent intention in possession, having known, *at the time he became aware of the possession*, that the coin was counterfeit. That was I thought the meaning of the section. The man may not have been present when his servant received it. There was no evidence in this case he was. I cautioned them more than once that the servant’s knowledge, if any, could not be attributed to the master. I also told them that possession involved the idea of retention. They had also to consider whether the money was kept in possession with a fraudulent intention and was such intention formed at the time when the fact of possession became known to the accused, if he came to know it at all. I explained why I thought the section difficult to apply.

I was particularly careful in choosing my words in delivering my charge, as I had an impression that the Jury had taken a view adverse to the accused.

As to paragraph 8 page 4:—

Cl. (a). I have already dealt with it. I referred to the fact the statement said to have been made by Soniram which led to the search in the Guddi of the accused was not before them and pointed out that we did not know what was said on the occasion and also that it did not appear that the accused was present when the coin was received. That all that the Jury had, was his presence at the

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time of search and discovery, the production by him of the key, his proprietorship, that he made a statement to the Police which led to a search in Strand Road for a Mahomedan who was subsequently arrested. That although the books were there, the Police Officer said he was not asked to see them, as against which Chotay Lal had said that he mentioned about the books to the Police Officer who said "Chup Rao." That it was for the Jury to choose between the two statements. I also pointed out that even if they accepted the statement made by the Police Officer, that he was not asked to see the books, it might be due to the fact that the accused did not know what was in the book, as to whether any money had been received from Soniram or not. I also pointed out that he did not know what he had said about the Mahomedan in Strand Road, except that he had said something which led to a search for him and his subsequent arrest. In connection with the books I said the comment made by Counsel for the prosecution, that their late production detracted from their value could be justly made.

Cl. (b). This is not correct, I referred to the argument of Counsel for the prosecution which was to the effect that the Jury might infer that inasmuch as Soniram's statement led to the search and discovery and since Soniram and the firm of the accused had business connection, that there was an agreement between them to utter counterfeit coin although the defence had denied it. I pointedly called attention to the fact that Soniram's statement was not before them. He had not been called. Soniram may have given a perfectly innocent answer, in no way incriminating the accused or showing any connection between the two. I said Counsel had to my mind unduly pressed that argument, that he had been somewhat "blood thirsty" in pressing it.

Cl. (c). I did mention about the coin being found mixed up with the exception of three in the small box. I called the attention of the Jury to the position in the box where they were said to have been found.

Cl. (d) & (f). I referred to the difficulty of distinguishing the coin. There was considerable cross-examination on the point and the coin was sounded in the presence of the Jury, who themselves examined the coin. Both sides referred to it at length. I called the attention of the Jury as to what was according to Gunga Sahai, his method of taking money.

Cl. (e). I did not refer to this. I believe counsel for the defence did.

*Mr. Norton* (with him *Messrs. A. P. Sen, D. N. Bose and B. N. Ghose*) for the Accused : In the absence of any evidence to show that I was present when my clerk took the coins, it follows that one of the essential elements in section 243 of the Indian Penal Code is missing. I suggested and produced books to show that on the 26th November, 1915, in consequence of a sale to Soniram of goods on the 23rd, I received Rs. 222. There was a heavy course of dealing between Soniram's firm and mine. If, as a matter of fact Rs. 222 was received on the morning of the 26th by my clerk and if, on the 26th Soniram made some statement to the Police, the presence of counterfeit coins in my till is explained and reasonably explained.

Under section 27 of the Indian Penal Code possession by my clerk is my possession for purposes of section 243. It follows that at that time I had no knowledge that the coins were counterfeit. There is no evidence that on that day the keys were ever transferred by my clerk to me till the Police raid. The only fact that is proved is that in my safe were found 160 bad coins mixed up with 374 good coins.

Contrasts section 241 with section 243, Indian Penal Code.

[Sanderson C. J.—How could he have knowledge one way or the other until he became possessed. Otherwise we will have to translate the section in this way—Having known at the time when the counterfeit coin was handed to the clerk that the coins were counterfeit].

Section 27 defines possession for the purposes of the Code. Section 243 makes the bare receipt of counterfeit coins with knowledge coupled with intent to defraud an offence, and the section says that the knowledge must be contemporaneous with receipt. The accused handed over the key to the Police as by way of transfer from his clerk. The learned Judge put it as a fact. But he has omitted the other fact.

[*Mr. B. C. Mitter* : It is only if the Court holds that there has been misdirection that my friend can go into these matters.]

Consciousness of possession is not consciousness of knowledge. Learned Judge has confused knowledge with possession. Possession he already had.

[Sanderson C. J.—That is the point.]

Why did he read out section 27 ? If his view was that section 27 did not control section 243 he ought not to have read section 27. You may have fraudulent intention but its presence will not satisfy the requirements of the section unless there is contemporaneous

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knowledge with receipt. That is a misdirection. The main point in the section is that you must prove before you come to fraudulent intent, whether at the time of receipt he knew that the coins were counterfeit. Reads "Such knowledge...accused." (See page 409.)

[Sanderson C. J.—This memo must not be taken word for word of what the learned Judge told the Jury but the substance of that].

The presence of 160 coins should not have been put forward to the Jury as evidence of *knowledge*. The only point is, I handed over the key to the Police. Even eliminating the defence evidence, there is no evidence of knowledge. Reads para 8 of the Certificate of the Advocate General.

[Sanderson C. J.—Can one go into that under cl. (26) if you do not show misdirection?]

No.

Points out omissions of the Judge to place points in favour of the accused.

Section 27 does control section 243.

Reads from Gour's Indian Penal Code Vol. I. as part of his argument.

*Mr. B. C. Mitter (Standing Counsel)* for the Crown: The first question is what are the matters that are open to the Court to go into in matters of this character. Reads cl. (26) of the Letters Patent. This clause has been twice construed, once so recently as in *Emperor v. Upendra* (1) and again in *Reg. v. Pestanji Dinshaw* (2). It has been held that the Court will not go beyond the Advocate General's fiat and *Reg. v. Pestanji Dinshaw* (2) also says that non-direction is not a matter into which the Court can enter.

With regard to para 7 of the Certificate of the Advocate General, so far as non-directions are concerned, from the note it appears that they were all put before him under a misapprehension.

As regards misdirection, the Judge's note is different from Counsel's note. Further there is evidence in this case. The key is produced by the accused. *R. v. Jarvis* (3). Having regard to the look of the Rupees—they are of 1898 and all fresh and there are 160 of them—there was evidence to go to the Jury.

Beyond the section, it is difficult to find any authority. The section means knowledge at the time when it came into his control. Section 243 refers to conscious possession. There must always be guilty knowledge or intent.

*Mr. Norton* in reply. Section 243 is a stringent section, because the mere possession of a coin with guilty intent is made punishable.

(1) (1914) 21 C. L. J. 377.

(2) (1873) 10 Bom. H. C. R. 75.

(3) (1855) 7 Cox. 53; 25 L. J. M. C. 30.

How can the producing of key be stretched to impute knowledge of the contents of the safe and of the spurious nature of the coins. There is no evidence that I knew that the coins were there at all.

The case of *R. v. Jarvis* (1) has no application. The facts of one case cannot be treated as an authority on the facts of another.

The prosecution has to prove (1) fraudulent intention and (2) possession and contemporaneous knowledge. You must give preliminary evidence of knowledge before you can come to question of guilty intent.

[The Court at this stage wanted Counsel to go into the merits of the case so that if they held that there was misdirection, they could proceed to deal with the case on its merits].

Counsel then dealt with the facts of this case.

*Mr. B. C. Mitter*: Ordinary way of proving guilty knowledge is by attempting to prove previous transactions or by showing the number of coins or by the identity in mould: Archbold's Criminal Pleadings, 24th Edition, 1095. You cannot give actual direct evidence of fraudulent intent. Refers to the evidence.

Section 27 of the Indian Penal Code does not apply. It would apply only to those cases where the property is the property of the master. But the property is not the property of the accused because there is no implied authority in any servant to receive false coins knowing them to be false.

If the servant received the coins in that way, then when the accused came to know of it and approved of it, the section would apply.

[Sanderson C. J.—There are two kinds of possession possible; one by accused himself and one by accused through his clerk. If the case for the prosecution is possession through clerk, then prosecution will have to prove that the accused knew that the coins were false at the time when the clerk received them. If the case is possession by the accused, the prosecution will have to prove that the accused had that knowledge when he received them. What was the case for the prosecution? ].

Suppose the coins came into the hands of the clerk; the clerk had no authority to receive such coins. The accused comes to know later on of the nature of the coins, and agrees that they should be retained. The custody of the clerk became possession of the accused and if the accused had knowledge at that time, the two elements agree. The Judge in his charge was here dealing with the

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case for the defence, namely, that it came into the possession of the clerk. By possession is meant receipt.

Refers to Stroud's Jud. Dic. Vol. III. p. 1516.

Refers to Coining Offences Act (24 and 25 Vict. Ch. 99 section (1) ; Pollock and Wright, p. 196 and Stephen p. 210.

*Mr. Norton* in reply.

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The judgments of the Court were as follows:

August, 29.

**Sanderson C. J.**—In this case the charge against the accused was as follows :—that he the said Fateh Chand Agarwalla on or about the 26th day of November in the year of our Lord 1915 in Calcutta aforesaid fraudulently or with intent that fraud might be committed, had in his possession certain counterfeit coins that is to say, 160 counterfeit rupees being counterfeit of the King's coin, having known at the time when he became possessed of them that they were counterfeit, and thereby he the said Fateh Chand Agarwalla committed an offence punishable 'under section 243 of the Indian Penal Code.

Secondly, that he the said Fateh Chand Agarwalla at or about the time and in the place aforesaid fraudulently or with intent that fraud might be committed, had in his possession certain counterfeit coins, that is to say 3 counterfeit rupees being counterfeit of the King's coin having known at the time when he became possessed of them that they were counterfeit, and thereby he the said Fateh Chand Agarwalla committed an offence punishable under section 243 of the Indian Penal Code.

He was tried at the criminal sessions of this Court, the Jury by an unanimous verdict convicted him of both charges and he was sentenced to a term of imprisonment. A representation was made to the Advocate General who gave a certificate under clause 26 of the Letters Patent to the effect that the question whether the direction to the Jury was right in law and whether certain alleged omissions to direct the Jury do not amount to a misdirection, should be further considered by the High Court, and consequently the petition to this Court was presented.

The accused had a place of business at 24 Armenian Street, Calcutta, and the case for the prosecution was that the police in consequence of certain information went on the 26th November, 1915 to the shop of one Soniram in Machua Bazar and searched it. They found in Soniram's shop 31 counterfeit rupees, dated 1898. In consequence of information received from Soniram the police proceeded to the shop of the accused, 24 Armenian Street,

and arrived there between 10-30 P. M. and 11 P. M. on the same evening. The accused, one Gungasahai, who was alleged to be the cashier of the accused, and another man named Choteylal who was alleged to be connected with the business, were present on the premises.

The evidence of the police officer was that in response to a request by him, the accused opened the safe which was locked, and the key of which was produced by the accused. In the safe was found

15 G. C. Notes of Rs. 10 each.

1 " " " " 5 "

4 " " " " 100 "

1 " " " " 1000 "

and 497 rupees ; these rupees were in a bag inside the safe.

The officer sorted them and found that 160 were counterfeit coins dated 1898. In a wooden box which was also inside the safe there were 40 rupees, 3 of which were counterfeit coins dated 1901. These three counterfeit coins were not mixed up with the other coins in the box

The coins were produced ; the 160 counterfeit coins of 1898 appeared to be new and were obviously made from the same die, and on comparison with the false coins taken from Soniram's shop, were found to be similar to them.

The accused was arrested. Before the arrest, according to the police officer's evidence, he was asked for an explanation ; he gave one ; thereupon the police officers proceeded to Strand Road, and searched the house of a Mahomedan, who was afterwards arrested at Dacca ; nothing was found at the house of the Mahomedan : the accused also referred the police officers to Soniram.

The cases of the accused, to support which Gungasahai and Choteylal were called as witnesses, was that Gungasahai was the cashier who used to receive the money in the ordinary course of business and that the daily receipts varied from Rs. 2,000 to Rs. 5000 a day. That when the police came to the shop on the 26th November 1915 Gungasahai had the key of the safe, and that he was asked by the accused for the key, and that he gave it to the accused.

The case for the defence further was, that Gungasahai must have received the 160 counterfeit rupees, that he did not know they were counterfeit, and it was suggested that the counterfeit money had been received that very day and that it might have been included in a payment of cash, Rs. 222, which Soniram had made that day.

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Although there were only two payments of cash, of an amount, larger than Rs. 160, received on that day, viz., one of Rs. 240 from other business premises of the accused, and one of Rs. 222 from Soniram, and although the counterfeit coins were all obviously new and bright coins and therefore likely to attract attention, Gungasahai, said he, could not make any suggestion from which party the coins came.

The first and main ground of the alleged misdirection was the direction given by the learned Judge to the Jury as to the construction of section 243, Indian Penal Code under which the charge was brought: secondly, it was contended in argument that the learned Judge should have directed the Jury that there was no evidence (a) to shew when, if ever, the counterfeit coins came into the actual possession of the accused, (b) to show that the accused had knowledge of the spurious character of the coins either when they were received by his servant, or at any time before the police raid.

With regard to the construction of the section, the passage of the summing up which was laid before the Advocate General, and upon which the certificate was based, was taken from learned Counsel's notes; but admittedly it did not represent a full or complete statement of the learned Judge's charge on this point. It was as follows:—"Counsel for the defence put too narrow a construction on section 243, Indian Penal Code when he said that the accused must have knowledge at the time when he became possessed of the coins. Knowledge that the coins were counterfeit at the time when he became possessed of the coins was not necessary. It is enough if the accused subsequently became aware of the spurious nature of the coins."

The learned Judge has supplied the Court and the parties with a memorandum of his summing up made for the purpose of this appeal, from his recollection and the notes which he used for his summing up, and it is upon the summing up as shown in the memorandum that the case was argued by both sides.

The learned Judge first dealt with the question of fraudulent intent, then with possession, in which connection he drew the attention of the Jury to section 27 of the Indian Penal Code and pointed out "that the law made possession of the servant on account of his master the possession of the master. The question of possession, therefore, was free from difficulty."

He then dealt with the question of knowledge, and after pointing out that it must be the personal knowledge of the accused, and that the knowledge of the servant would not be sufficient, he

directed the Jury that they had to decide two matters in this connection (1) Had the accused knowledge that he was possessed of counterfeit coin. (2) If he had knowledge, did he intend fraudulent use and if so at what time did he so intend ?

After dealing with the first point and telling the Jury that they had to find on the evidence whether the accused had actual knowledge or not, he then proceeded to direct the Jury as to the time of knowledge in connection with intention as follows :—

“The next point was about the time of knowledge in connection with intention. The section says ‘having known at the time when he became possessed of it.’ I thought that Counsel for the defence had put too narrow a construction upon it. I was of opinion that it referred to the time of *conscious possession* so far as the accused was concerned, that it need not be the time when the servant received the money. I thought that it referred to the time when the master came to know that the coin had been received. The point to consider was ; had the accused fraudulent intention at that point of time *when he became aware of the possession*, became conscious of the possession or had knowledge of it. Such knowledge need not be contemporaneous with the receipt of the coin if the accused did not receive the money ; but some one else had received it on his behalf. So to construe, would be to restrict the scope of the section. The essential point was, was the accused fraudulently, or with fraudulent intention, in possession, having known, *at the time he became aware of the possession*, that the coin was counterfeit. That was, I thought, the meaning of the section. The man may not have been present when his servant received it. There was no evidence in this case that he was. I cautioned them more than once that the servant’s knowledge, if any, could not be attributed to the master. I also told them that possession involved the idea of retention. They had also to consider whether the money was kept in possession with a fraudulent intention, and was such intention formed at the time when the fact of possession *became known to the accused*, if he came to know it at all. I explained why I thought the section difficult to apply.”

I agree with the learned Judge that this section is one which it is difficult to apply, but with great deference to him, I do not think that the construction which he placed upon the section, as indicated in his summing up, is correct.

To constitute an offence under this section (1) it must be proved that the accused was in possession of the coin,

(2) that the coin was counterfeit of the king’s coin,

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(3) that the accused was in such possession fraudulently or with intent to defraud,

(4) that at the time he became possessed of such counterfeit coin, he knew it to be counterfeit.

Section 27 of the Indian Penal Code provides that when property is in the possession of a person's wife, clerk, or servant on account of that person, it is in that person's possession within the meaning of this Code, and by section 7 of the Indian Penal Code, it is enacted that every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation.

Consequently section 243 must be read in view of these two sections, and therefore two kinds of possession may have to be considered in connection with a case under this section, *viz.*, the possession of the accused person himself and the possession of an accused person's wife, clerk or servant on account of that person.

In the case now before us it was alleged by the defence that the counterfeit coins must have been received in the first instance by the servant of the accused, *viz.*, Gungasahai, and that they remained in his possession ; on the other hand it was urged for the prosecution that the counterfeit coin was found in the locked safe of the accused ; that the accused kept the key and the number of counterfeit coins was large and that from such facts it was only reasonable to suppose that the accused was in possession of the coins and that he must have known when he became possessed of them that they were counterfeit. Having regard to the facts and the contentions on this part of the case, in my judgment a direction should have been given to the Jury to the effect that they should come to a decision, (1) whether the counterfeit coins were in the possession of the accused, or in the possession of his clerk or servant on behalf of the accused : and *second*, if they came to the conclusion that the coins were in the possession of the accused, they would then have to decide whether he knew at the time when he became so possessed of them, that the coins were counterfeit : *third*, if they came to the conclusion that the coins were in the possession of the clerk or servant on behalf of the accused, they would then have to decide whether at the time the clerk or servant on behalf of the accused became possessed of the counterfeit coins, the accused himself knew that they were counterfeit. I do not find that these questions were put either directly or indirectly to the Jury ; on the contrary the Jury's attention was directed to a

question which was said to be the essential question, *viz.*, whether "the accused was fraudulently, or with fraudulent intention, in possession, having known *at the time he became aware of the possession* that the coin was counterfeit." This was in my judgment not a correct direction, and for the reasons given above : and while agreeing with the learned Judge that the section is a difficult one to apply, I must with deference differ from him on the point of construction. In view of the above conclusion it is not necessary to give any opinion as to the second contention as to the alleged omission of the learned Judge to direct the Jury. It was also urged during the course of the argument that the learned Judge ought not to have left the case to the Jury at all, as there was no evidence on which the charge could be supported.

I do not think this really was open to the learned Counsel for the accused in view of the terms of the certificate of the Advocate General ; but even if it was open for argument, in my judgment there was evidence which the learned judge was bound to leave to the Jury in support of the charge.

In view, however, of the fact that I think there was a misdirection, as already indicated, in a part of the summing up, which related to a material and essential element of the charge, I think the conviction should be set aside. I do not think the facts are so clear that we should be justified in saying that the misdirection has not in fact occasioned a failure of justice.

In my judgment, therefore, the conviction should be set aside.

**Mookerjee, J.**—This is an application for review of a criminal case on the certificate of the Advocate General under clause 26 of the Letters Patent. The petitioner Fateh Chand Agarwalla was tried at the third Criminal Sessions of this year on a charge of offences punishable under section 243 of the Indian Penal Code, and, on the unanimous verdict of the Jury, was convicted and sentenced to undergo rigorous imprisonment. The accused then applied to the Advocate-General and obtained a certificate that "in his judgment, whether the direction to the Jury (hereinbefore specified) was right in law and whether the alleged omissions to direct the Jury do not in law amount to a misdirection should be further considered by the High Court." To determine the points of law certified by the Advocate General, it is necessary to give a brief outline of the history of the trial.

The accused is the owner of two flour-mills, one in Armenian Street, the other in Hanspukur Road, and carries on considerable business. On the 26th November 1915, Purnachandra Lahiri, Asst.

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Commissioner of Police, received information that there were counterfeit coins in the shop of one Soniram Agarwalla in Machua-bazar Street. Lahiri searched the shop that very day, and found 31 spurious coins which bore the year 1898. Soniram gave him certain information, and he raided the shop of the accused in Armenian Street late in the evening between 10-30 and 11 P. M. The case for the prosecution is that they found in an iron safe (the key of which was produced by the accused) 160 counterfeit coins (1898) similar to the 31 coins found in the shop of Soniram. The Police further found 3 counterfeit coins, which bore the year 1901, in a wooden box inside the safe. The 160 coins were found in a bag mixed up with 337 genuine rupees. Inside the safe, there were also 37 genuine rupees and currency notes to the extent of Rs. 1555. The Police took charge of the currency notes (Rs. 1555), the genuine coins (Rs. 374), and the counterfeit coins (Rs. 163). At the time of the search, there were present in the shop, besides the accused, one Gangasahai, alleged to be his cashier, and another man named Choteylal, said to be his partner in the Electric Flour Mill. The case for the defence was that his cashier receives, as a rule, all moneys paid into the shop, that on the day of the incident Gangasahai was the cashier, that he himself did not receive the counterfeit coins, that it was quite likely that the coins were included in a payment of Rs. 222 made on that date by Soniram for goods supplied on the 23rd November, and, that, as payments had been made by other persons also on the same date, it was impossible to state with certainty how or from whom the spurious rupees were received. In support of the defence, both Gangasahai and Choteylal were examined, and what purported to be the account-books of the firm were also produced. In these circumstances, the question arises, whether there was an error of law in the charge to the Jury.

Section 243 of the Indian Penal Code is in these terms : "Whoever fraudulently or with intent that fraud may be committed is in possession of counterfeit coin which is a counterfeit of the Queen's coin, having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine."

To establish that the accused has committed an offence under this section, it must be proved,

- (1) that the coin in question is a counterfeit of the Queen's coin ;
- (2) that the accused is in possession of it ;

(3) that he was in possession thereof fraudulently (that is, with intent to defraud, or with intent that fraud might be committed) ;

(4) that at the time that he became so possessed thereof, he knew it to be counterfeit. The term "possession" has to be interpreted in the light of section 27 which by virtue of section 7 is applicable wherever the term is used in the Code. Section 27 which abolishes the distinction recognised in English Law between possession and custody, provides as follows :

"When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code."

Consequently, an accused charged under section 243 may be proved to be in possession within the meaning of that section, if he is in possession in either of two modes, namely, (a) he may be in possession of the coin himself, or (b), he may be in possession, because his wife, clerk or servant is in possession of the coin *on his account*. It is plain that whichever mode of possession is established, it is essential to prove that at the time the accused became possessed of the coin, he knew it to be counterfeit. The vital point of the matter, then, is to determine the precise moment when the accused becomes possessed of the coin in either of the two modes whereby possession may be acquired. If the coin is delivered directly into the hands of the accused, there is no room for controversy that he does, at that moment, become possessed of it, and, in such a case, it is necessary to establish that the accused knows that the coin is counterfeit when it is so delivered to him. When, however, the coin is delivered to the wife, clerk or servant of the accused, a different question arises, a question which may be by no means easy of solution in the circumstances of a particular case. Possession of property by the wife, clerk or servant of a person is, under section 27, his possession, *only if the possession is on his account*. Consequently, when a spurious coin is delivered to the wife, clerk or servant of a person, it does not necessarily follow that he is in possession from that moment ; it must further be shown that the person to whom it has been delivered possesses it on his account. Questions of extreme nicety may, in this connection, arise on the facts of some cases, as may be seen from the decisions in *R. v. Boober* (1) and *Anglo-American Oil Co. v. Manning* (2). There may, on the other hand, arise obviously simple cases, as in *R. v. Weeks* (3). For example, A asks a coiner, B, to supply him

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(1) (1850) 4 Cox. 272.

(2) (1908) 1 K. B. 536.

(3) (1861) 8 Cox. 455 ; L. &amp; C. 18.

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with 100 spurious coins and instructs him to leave them with his servant if he is not at home ; as soon as the parcel is delivered to the servant, A is in possession of the coins. On the other hand, suppose B, a coiner, delivers to the servant of A, without the knowledge of A, a packet of spurious coins ; it cannot be said that A is necessarily in possession of the coins from the moment of their delivery to his servant. Consequently, when property is in the possession of a servant, it is essential to determine, whether, upon the special facts of the case, it can be said that he is in possession on account of his master. This may be answered in the affirmative, either because, from the very moment when the property comes into the possession of the servant, he was in possession on behalf of his master, or, because, though not in possession on his behalf at that time, he becomes so possessed later on by reason of events subsequent. When this moment of time has been determined, there must be proof that at that moment the accused had knowledge that the coins are counterfeit. In my opinion, the charge in this case should have specified that the first point for the Jury to determine was, whether the coins had been delivered to the accused himself or to his Cashier. The charge should further have specified that the second point for determination by the Jury would depend upon their view of the first question. If they found that the coins had been delivered to the accused himself, they would have to determine whether, when he received the coins, he knew that they were counterfeit ; if, on the other hand, they came to the conclusion that the coins were delivered to the Cashier, they would have to decide, whether from the moment of such delivery or only from a later period, the possession of the Cashier was on account of the accused. They would finally have to decide, whether at the time when the Cashier could be said to be in possession *on account of his master*, the master had knowledge that the coins were counterfeit. After a careful perusal of the notes of the charge as drawn up by the learned Judge, I regret I cannot see any escape from the conclusion that the charge involved an error of law, inasmuch as it was based on an erroneous view of the requirements of section 243, specially with reference to the element of time when the accused must be proved to have known that the coins were counterfeit. I may add that I have based my conclusion, not upon the notes supplied by Counsel, but upon the notes of the learned Judge himself, for, as pointed out in a long series of decisions mentioned in the case of *Emperor v. Upendranath Das* (1),

the statement of the Judge who presides at the trial as to what actually took place before him is conclusive. But though the version of the charge, whereupon the certificate of the Advocate-General was granted, differs in certain respects from the substance of the charge as given by the learned Judge, the certificate does, in my opinion, substantially bring out the question in controversy, and it has consequently not been necessary to require an amended certificate, as was done in the case of *Emperor v. Upendranath Das* (1); there the Court found that the questions sought to be raised on review, were fundamentally different from the points of law specified in the certificate of the Advocate-General. I desire to add further, as the application for review is based on allegations of not only erroneous direction but also non-direction, that, in my opinion, mere non-direction is not necessarily misdirection. The true rule on the subject was enunciated by Lord Alverstone C. J. in *Rex v. Stoddart* (2): "It is no misdirection not to tell the Jury everything which might have been told them. Again, there is no misdirection unless the Judge has told them something wrong, or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood."

In the view that there was misdirection in the charge to the Jury, the question arises, what course should be pursued. Reference was made on behalf of the Crown to section 537 of the Criminal Procedure Code, 1898, which provides that no sentence passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII (confirmation of sentences of death), or on appeal, or revision, on account of any misdirection in any charge to a Jury, unless such misdirection has in fact occasioned a failure of justice. But section 537 is clearly of no avail. In the first place, the section has no application to a case reviewed under clause 26 of the Letters Patent. The proceeding is not by way of appeal, which is expressly excluded by clause 25; nor is it in the exercise of revisional jurisdiction, which is created by clause 28; and it is needless to observe that it does not fall within the scope of the chapter which deals with the confirmation of sentences of death. In the second place, even if section 537 had applied, I would not hesitate to hold, on the facts of this case, that the misdirection had in fact occasioned

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(1) (1914) 21 C. L. J. 377.

(2) (1909) 2 Cr. App. Rep. 217 (246).

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failure of justice. We must, consequently, consider the scope of the authority of the Court under clause 26 of the Letters Patent.

Mr. Norton contended, on behalf of the accused, that if the Court comes to the conclusion that the Jury were misdirected, there is no option left to the Court but to set aside the conviction and acquit the accused. In support of this argument, he relied upon the decision of the Judicial Committee in *Subramaniya v. King-Emperor* (1). Mr. Mitter, on behalf of the Crown, contested the validity of this contention as opposed to the settled practice of this Court. The question raised, if it were *res integra*, must be deemed not free from difficulty. Clauses 25 and 26 make it plain that, when a point or points of law have been reserved or have been certified by the Advocate-General as erroneously decided or as worthy of further consideration, the Court has full power and authority "to review the case or such part of it as may be necessary, and finally determine upon such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right." It is obvious that the intention is that the case should be finally decided on review and not remitted for re-trial. It has also been ruled that when the Court on review holds on the point of law in favour of the accused, it is competent to the Court to consider the whole case on the evidence and to pass such sentence as shall seem right. The Bombay High Court followed this procedure in the cases of *R. v. Navroji* (2) and *Imperatrix v. Pitambar* (3); in each instance although the Court decided the question of law in favour of the accused, yet, upon a review of the whole case and an examination of the merits, affirmed the conviction. In this Court, the same procedure was adopted in the cases of *Queen v. Hurribole* (4) and *Queen v. O'Hara* (5); in each instance, the point of law was decided in favour of the accused; but on a review of the whole evidence, while the conviction was affirmed in the former case, it was set aside in the latter instance. The cases of *Queen v. Sibchandra* (6) and *Emperor v. Upendranath Das* (7) do not directly touch the present question, inasmuch as the alleged error of law was not established in either instance. The only question, thus, is, whether the decision of the Judicial Committee in *Subramaniya v.*

(1) (1901) I. L. R. 25 Mad. 61.

(2) (1872) 9 Bom. H. C. R. 358.

(3) (1877) I. L. R. 2 Bom. 61.

(4) (1876) I. L. R. 1 Calc. 207; 25 W. R. Cr. 36.

(5) (1890) I. L. R. 17 Calc. 642.

(6) (1884) I. L. R. 10 Calc. 1079.

(7) (1914) 21 C. L. J. 377.

*King-Emperor* (1) overrules in effect the decisions in *Queen v. Hurribole* (2) and *Queen v. O'Hara* (3). The point is not free from difficulty and deserves much fuller examination than is possible on the arguments addressed to us. The accused, in the case of *Subramaniya v. King-Emperor* (1), was charged upon an indictment which contained seven counts and was jointly tried with an abettor who was charged with abetment of the offences set out in three of the counts. The accused was convicted and sentenced to undergo imprisonment and to pay a heavy fine. He then obtained a certificate from the Advocate-General under clause 26 of the Letters Patent, and the points of law were heard by a Full Bench of six Judges. The Judges were equally divided in opinion upon the question whether the first count was bad ; but the majority were agreed that whether good or bad, its union with the remaining counts made the whole indictment bad for misjoinder ; they held, however, that it was open to them to strike out the first count and to deal with the evidence applicable to the remaining counts. The accused contended that the Court was not competent to deal with the case in this manner, to usurp the functions of the Jury and to substitute in essence the judgment of the Court for the verdict of the Jury. The Court overruled the objection raised as to its jurisdiction to review the case upon the evidence, and the six Judges sat a second time to hear the case on the facts. They examined the evidence, came to the conclusion that the conviction could be sustained on the counts other than the first which they had expunged, and passed sentences on the remaining counts in modification of the original sentence. The accused obtained special leave to appeal to His Majesty in Council. Before the Judicial Committee, the point was pressed that the trial was bad for misjoinder of charges and that the Court had no power, under clause 26 of the Letters Patent, to decide the case on the residue of the evidence. The Judicial Committee came to the conclusion that the trial had been held in contravention of section 234 of the Criminal Procedure Code, inasmuch as the accused was charged in the indictment with no less than 41 acts extending over a period of two years, whereas, under the law, he could be tried only for three such offences of the same kind if committed within a period of twelve months. Lord Halsbury L. C. then proceeded to observe as follows : "Their Lordships think that the course pursued, which was plainly illegal, cannot be amended by arranging afterwards what might or might not have been

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properly submitted to the Jury. Upon the assumption that the trial was illegally conducted, it is idle to suggest that there is enough left upon the indictment upon which a conviction might have been supported, if the accused had been properly tried. The mischief sought to be avoided by the statute has been done. The effect of the multitude of charges before the Jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty, only to such parts of the written accusation as ought to have been submitted to the Jury. *It would in the first place leave to the Court the functions of the Jury and the accused would never have really been tried at all upon the charge arranged afterwards by the Court.* Their Lordships cannot regard this as cured by section 537." In this view, their Lordships did not consider whether the conviction on any of the counts could be supported on the evidence adduced at the trial, and allowed the appeal. On this judgment, Mr. Norton based the contention that, in no circumstances, is the High Court competent under clause 26, to review the case on the evidence. This raises the question, whether the Judicial Committee intended their observations to be limited to cases of the type then before them, namely, cases where the trial has been conducted in a mode prohibited by law, or, in the words of Lord Russell quoted by them, where the proceedings have been constituted in a way not authorised by law and the rules applicable to procedure; or did the Judicial Committee intend to go further and to include in their observations cases of the type of *R. v. Navroji* (1), *Queen v. Hurribole* (2) and *Queen v. O'Hara* (3), where evidence had been erroneously received, or cases of the type of *Imperatrix v. Pitambar* (4), where evidence was improperly rejected, or, again, cases of the type of the one now before us, where the error assigned consists in the erroneous exposition of a principle of law or the constituent elements of the offence charged; or, did the Judicial Committee intend, in substance, to adopt the rule enunciated by themselves in the earlier case of *Makin v. Attorney-General for New South Wales* (5), where they had emphatically condemned the transference from the Jury to the Court the determination of the question whether the evidence, that is, what the law regards as evidence, established the guilt of the accused? These are questions not wholly free from difficulty, and, in the absence of full arguments thereon at the Bar, I must reserve my opinion on them. This is rendered possible, because, in my judgment, an examination of the

(1) (1872) 9 Bom. H. C. R. 358.

(2) (1876) I. L. R. 1 Calc. 207.

(3) (1890) I. L. R. 17 Calc. 642.

(4) (1877) I. L. R. 2 Bom. 61.

(5) (1894) App. Cas. 57.

evidence, assuming it to be permissible, shows that the conviction cannot be sustained. There are lacunas in the evidence which make it impossible for me to hold that the elements essential for a conviction under section 243 have been established. I do not propose to review the evidence in detail; but I desire to state that upon one fundamental point, namely, who had the key of the iron-safe, there is really no contradiction. Lahiri stated that the key was produced by the accused; he does not appear to have been cross-examined upon this point. Ganga Sahai stated that the keys were with him, then when the police came, his master asked for the keys, that he gave them up and the safe was opened. This witness also does not appear to have been cross-examined on this point. The two statements may obviously be reconciled. If, then, the coins were received by Ganga Sahai as he would seem to assert, and if the keys were with him when the Police came, how does the prosecution establish the requisite elements under section 243? The evidence clearly does not prove that the case falls within that section. Much stress was laid on the large number of coins and their appearance, and reference was made to *R. v. Jarvis* (1), where *R. v. Fuller* (2) was followed. These cases are of no assistance to the Crown, in the absence of evidence, direct or circumstantial, to show that the accused had seen the coins or had even been aware of their existence in the safe before the Police raided his shop. I also find from the notes of evidence that on behalf of the Crown the suggestion was made to two of the defence witnesses, Ganga Sahai and Choteylal, that there was an agreement between the accused and Soniram to pass counterfeit coins at a profit. In my opinion, this was calculated to prejudice the accused and was obviously unfair to him, if there was no basis for the suggestion; if, on the other hand, the suggestion was well-founded in fact, the Crown should have adduced the evidence at their disposal. It has been repeatedly ruled that the duty of the prosecution is, not to secure a conviction, but to assist the Court in arriving at the truth, and for that purpose to place before the Court all the material evidence at its disposal: *Ramranjan v. King-Emperor* (3); *Amritalal v. King-Emperor* (4); *Emperor v. Nagendra* (5). On an examination of the whole evidence, my conclusion is that the conviction cannot be sustained.

In my judgment, this application must be granted and the conviction and sentence set aside.

(1) (1855) 7 Cox. 53; *Dearsly* 552.

(2) (1816) *Russell & Ryan* 308.

(4) (1915) 21 C. L. J. 331.

(3) (1914) 10 C. W. N. 28.

(5) (1915) 21 C. L. J. 396.

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**Fletcher J.**—The only matters that have been certified by the Advocate General in this case are first, whether the direction set out in paragraph 7 of petition for review was right in law, secondly whether the matters set out in paragraph 9 of the same petition vitiated the trial, and thirdly, whether the alleged omissions to direct the Jury on the matters referred to in paragraph 8 of such petition, amounted to misdirection. The second and third heads may be shortly disposed of. The second head does not represent what in fact took place at the trial. The third head has not been argued before us.

We are, therefore, left to deal with the first head, namely the alleged misdirection set out in paragraph 7 of the petition for review.

The two charges on which the accused was tried were framed under section 243 of the Indian Penal Code, namely of being in possession of certain counterfeit coins with intent to utter the same, the accused having known at the time he became possessed of the same that they were counterfeit. The case set up by the prosecution was as follows :—On the 26th of November last on a search by the Police at a shop at Machuabazar Street, Calcutta belonging to one Soniram Agarwalla Thirty one counterfeit (1898) rupees and other base coins were found. Soniram was arrested. Acting on certain information received from Soniram the Police at about 10-30 or 11 P. M. the same night raided the premises of the accused and found in an iron safe, the key of which was produced by the accused and opened by him, 160 counterfeit (1898) rupees similar to the 31 counterfeit rupees found in the shop of Soniram. The Police also found 3 counterfeit (1901) rupees in a wooden box inside the safe—the key of which box was also produced by the accused.

The 160 counterfeit (1898) rupees were found in the safe inside a bag mixed up with 337 genuine rupees. Thirty seven other genuine rupees and currency notes for Rs. 1555 were also found in the safe.

Now if the case had stopped there, the Jury could obviously have found that the accused had committed the offences with which he was charged. The possession of so large a number as 160 counterfeit rupees all bearing the same date and appearing as if they had recently been issued from the mint, are facts from which the Jury might well have inferred, in the absence of any explanation by the accused, that the accused must have known that at the time he became possessed of the same, that they were counterfeit and that the accused could not be in possession of such a large number of

counterfeit rupees except fraudulently, or with intent that fraud might be committed. The accused, however, called evidence in support of his defence.

The principal witness was one Ganga Sahai said to be the cashier of the accused's firm and so acting in November last. His evidence was to the effect that he received moneys and made payments on account of the accused's firm and that he never received any counterfeit rupees to his knowledge. He also produced certain books of account alleged to be the books of the accused's firm showing the payment on the 26th of November last of the sum of Rs. 222 by Soniram to the accused's firm on account of certain goods sold and delivered.

Now it seems to me obvious that Counsel for the defence in his address to the Jury had argued that even if the Jury came to the conclusion on the evidence that at the time the accused obtained physical possession of the counterfeit rupees he knew that they were counterfeit, no offence had been committed under section 243 of the Indian Penal Code, because the evidence called by the defence proved or strongly suggested that moneys paid to the firm were received by the cashier Ganga Sahai. It seems to have been argued that under the provisions of section 27 of the Indian Penal Code the possession of Ganaga Sahai was the possession of the accused, and as the accused would not at the very instant become aware of any payments made to his cashier, he would not in the ordinary course know, at the time he became possessed of the counterfeit rupees, that they were counterfeit. In dealing with this argument the learned Judge gave the direction to the Jury that is complained of.

If the direction had been in the terms set out in paragraph 7 of the petition for review, it would clearly have been a misdirection. The learned Judge has, however, furnished us with a note of his charge to the Jury, and the portion dealing with the argument before-mentioned is as follows :—"The section says 'having known at the time when he became possessed of it', I thought that Counsel for the defence had put too narrow a construction upon it. I was of opinion that it referred to the time of conscious possession so far as the accused was concerned, that it need not be the time when the servant received the money. I thought that it referred to the time when the master knew that the coin had been received. The point to consider was, had the accused the fraudulent intention at the point of time when he became aware of the possession, became conscious of the possession, or had knowledge of it. Such know-

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ledge need not be contemporaneous with the receipt of the coin if the accused did not receive the money, but some one else had received it on his behalf." I venture to think that, that was a proper direction of the learned Judge to give to the Jury in the circumstances of the case. The cashier Ganga Sahai was put forward presumably as a witness of truth, and it must be taken in accordance with his evidence that he had no knowledge of the receipt of the counterfeit rupees. If the cashier Ganga Sahai had no authority to receive counterfeit coin on behalf of the accused and did not in fact know that he had received them would the fact that the counterfeit coins had passed through the hands of Ganga Sahai to the accused prevent the accused, if the other elements necessary to prove the offence were present, from being convicted of an offence under section 243 of the Indian Penal Code? In my opinion it would not. No doubt, under the provisions of section 27 of the Indian Penal Code when property is in 'possession of a person's wife, clerk or servant on account of that person, it is in the person's possession within the meaning of the code. But not every possession of a person's wife, clerk or servant is his possession—it must be possession on account of that person. For instance, possession by a housemaid of stolen property is not the possession of her master unless the housemaid has been authorised to receive it, or her possession has been ratified, as the receipt of stolen property is not within the scope of a housemaid's authority.

In the present case it is not suggested that Ganga Sahai had authority to receive counterfeit rupees on behalf of the accused. His possession was not, therefore, I think, on account of the accused, and the learned Judge I think correctly directed the Jury that the point of time they had to look at, in the circumstances of the case, was the time when the accused had actual or, as the Judge calls it, conscious possession of the counterfeit coins for determining whether he had knowledge at that time that the coins were spurious. In my opinion, therefore, the direction of the learned Judge, to which the Advocate General's certificate relates, was correct. The application for review ought, I think, to be refused.

The majority of the Bench, however, are, I understand, of a contrary opinion, and in that view of the case it becomes necessary to consider whether in a review we should affirm the conviction and sentence. The verdict of the Jury in accordance with the opinion of the majority of the Bench not being a verdict arrived at after proper directions as to the law, we have to review the evidence

without having the benefit of an opinion, which we can act on, of the Court which saw the witnesses give their evidence, and observed their demeanour. In that view I think with evidence both on the side of the prosecution and the defence, we cannot say that the defence evidence is so palpably false that a conviction ought to take place.

In view of the fact that the majority of the Bench are of opinion that there was a misdirection by the learned Judge, I agree that conviction and sentence ought to be set aside.

**Teunon J.**—In this case the petitioner before us one Fateh Chand Agarwalla has been convicted on two charges under section 243 of the Indian Penal Code. The conviction was had on the 7th July 1916 at the Criminal Sessions holden in this Court and the matter comes before us on a certificate granted by the learned Advocate General under the provisions of section 26 of the Letters Patent.

The case for the prosecution was that at about 11 P. M. on the 26th November 1915 the business premises of the accused were searched by an Assistant Commissioner of Police, who, in a safe, the key of which was produced by the accused, found 160 counterfeit rupees bearing date 1898 and three counterfeit rupees bearing date 1901. The 160 were in a bag mixed up with 337 good rupees and the 3 bearing date 1901 were in a wooden box in which it appears there were also 37 good rupees, though in this case the good and the bad were not mixed together.

The first count or charge on which the accused has been convicted referred to the 160 rupees bearing date 1898, and the second charge or count to the 3 bearing date 1901.

In the safe were also found currency notes aggregating Rs. 1555 in value and small coins to the value of some Rs. 200. It was the further case for the prosecution that at a search of the shop or business premises of another trader named Soniram Agarwalla, made by the same Assistant Commissioner of Police 1½ hours earlier, 31 counterfeit rupees were found, and that it was on information received from Soniram that the search officer proceeded to the premises of this petitioner. In fact the 31 counterfeit found at Soniram's were similar to the 160 found in the petitioners' safe and all appear to be from the same die.

The prosecution rested its case on the possession by the accused of this large number of counterfeit coins and left it to the accused to rebut the presumption thereby created.

The accused did not deny that the coins were found in his safe

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but pointed out that as the owner of two flour mills he had a considerable business and that for the receipt and payment of monies he employed a cashier by whom monies received were placed in the safe. He also alleged that in the course of the 26th November a payment of Rs. 222 had been made by the very Soniram in whose possession similar counterfeit coins had been found. In short he denied all personal knowledge of the existence of base coins in his safe and alleged the possibility of a fraud practised upon his cashier by Soniram.

In support of his defence the accused examined his cashier Gunga Sahai and a second witness Chotey Lal said to be his partner. These witnesses speak of the duties of the cashier, of the extent of the business, of the firm's dealings with Soniram and of the transaction with the latter on the 26th. The cashier also explained how he tested the coins offered to him.

From the learned Judge's charge to the Jury it would seem that he was satisfied that the accused did in fact carry on an honest business on a considerable scale, and that in this business money came in and went out daily. He appears also to have been satisfied that in the ordinary course of business the money now in question would have been taken in by the cashier and he pointed out to the Jury that it did not appear that the accused was present when the coin was received.

It is impossible for us to say what view was taken by the Jury of any particular portion of the evidence but from their verdict it is clear that they were satisfied that the accused had knowledge of the spurious character of the coins, and intended to make a fraudulent use of them.

But in order to a conviction under section 243 of the Code, the law requires that the accused should have this knowledge that the coin in question is counterfeit "at the time when he became possessed of it."

If we could take it that the Jury had found that the accused had himself received the money from his customer or customers, the case would present no difficulty. The difficulty is caused by the interposition or possible interposition of the cashier. By virtue of section 27 of the Code the possession of the cashier on account of his master is the master's possession. Now, on this aspect of the case, the learned Judge directed the Jury to the effect that if the money had in fact been received by the cashier the requirements of the section would be satisfied if the Jury found that the accused had knowledge of the spurious character of the coin when he

"became aware" that the coin had been received or "became conscious" of his possession ; that is to say, the Jury were directed that if the receipt by the cashier on the account and for the use of the accused and the accused's knowledge of the receipt were not contemporaneous, the Jury should have regard not to the time of receipt but to the later point of time when the accused's unwitting possession became conscious possession.

With all respect I am unable to agree in this interpretation of the section.

In the case of an employer doing a large business, such knowledge or consciousness might be deferred for days. During those days, for all other purposes, for instance, for the purposes of the sections relating to theft, the coins are to be treated as in the employer's possession ; for the purposes of the section under consideration, they are in this view not to be so regarded : for this purpose, the employer's possession is to be deferred until he has seen them or been otherwise informed of their true character. But this appears to be contrary to the provisions of section 7 which requires us to give to the expression 'possession' the same sense or value in all parts of the Code.

It has been contended that 'conscious retention' is implied or is a necessary element in all possession. In so far as that may be so, it would seem that in cases where possession is held or obtained through a servant, the law makes the conscious retention of the servant on the master's account supply the place of the conscious retention of the employer. It is of course otherwise with the knowledge of the base character of the coin. Such knowledge must be personal.

It has also been urged that to place upon the section the interpretation which I do is unduly to restrict its scope and to make it extremely difficult of application in the case of shop-keepers, traders or business men. I am not pressed by that argument. I can see no reason on principle why the employer, whose cashier has received bad coin otherwise than in conspiracy with him, should be placed in a worse position than the unwary person upon whom bad coin has been passed. In any case, if there is a defect in the law, the remedy is with the Legislature.

In the view I take, reading the verdict with the charge, it cannot, I think, be held that the Jury have found that the accused knew of the spurious character of the coin in question when he first came into possession of or originally obtained it.

That being so, we have to consider the case on the

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The takings in the accused's business appear to average Rs. 1000 a day, and it appears to be fairly clear that, in ordinary course, the coins in question would have been received by the cashier. It was apparently not seriously suggested in the trial Court that the accused and his cashier were engaged in a conspiracy for the object of uttering base coins. If the 160 coins bearing the date 1898 were in fact received from Soniram on the 26th, it is not clear that the accused must have seen them, as it would seem that the practice is that the accounts are made up in the morning. The coins are fresh and this take with their number should possibly have excited suspicion. Apart from this, these coins are remarkably good imitations. There is no difference in size, the difference in sound and weight is not noticeable, and it is only when the coins come to be examined that the differences in the heading, lettering and effigy, are observed.

On the whole, though the case is one of grave suspicion, the accused is, I think, entitled to the benefit of doubt.

I should, therefore, acquit him and direct that his bail-bond be discharged.

**Chaudhuri J.**—I am of opinion that I correctly interpreted the meaning of section 243, Indian Penal Code, to the Jury. My note deals with the points raised in the certificate of the Advocate General, but it may be taken as practically containing the whole of my charge. It sets out my view of the law, but I shall add a few comments on the points discussed before us.

Section 27, Indian Penal Code, lays down that when property is in the possession of a servant, on account of his master, it is in the master's possession. Section 7 says that every expression which is explained in any part of the Code, is used in every part of the Code in conformity with the explanation. Therefore "in possession" throughout the code includes the servant's possession on account of the master as the master's possession. There is, however, a clear distinction in law between "custody" and "possession." Custody means possession on account of another. A person in possession of his property is not in custody of it, but a servant is, when he holds the property on behalf of his master. Although such possession of the servant is the master's possession, the possession of the master cannot always be said to be that of the servant, though he may be in charge. Let us take section 266, Indian Penal Code. It seems to me that the words "in possession" there, do not apply to a servant in charge of his master's shop, in the master's absence. Learned

Counsel for the defence agreed with that view. In England it has been held not to apply to that case. See *Smith v. Webb* (1).

In the Penal Code different expressions have been used in different places, which indicate that a distinction between "being in possession" and "becoming possessed" was intended. Sections 239 and 241 may be referred to in this connection. Section 239 deals with the case of a person "*having*" any counterfeit coin, "which at the time he became possessed of it, he knew to be counterfeit, delivering the same to any person fraudulently." This section has been held not to apply to a coiner, who manufactures counterfeit coin. He *has* it, or in other words he is in possession of it and although he may have intended fraudulent use with it, he is not liable, having regard to the words used in the section "which at the time he became possessed of." See *Queen v. Sheobux* (2). Section 241 deals with the time when the person charged "took it into his possession."

The Penal Code has not used the expression "custody" in dealing with the servant's possession on behalf of the master, but it is quite another thing to say that the distinction in law between "custody" and "possession" has been wiped out by the Penal Code. Confusion has resulted from the two ideas being thus mixed in section 27. It is interesting to note that Mr. Norton, senior, objected to clauses 17 and 18 (the original sections corresponding to section 27) when the Code was under discussion, as it did not contain the words "*with the consent and knowledge of the husband or master.*" The Law Commissioners, although they made some alterations which do not affect this point, thought the objections would have weight, if such constructive possession could be charged against the party possessing, as a criminal possession, in order to bring him within the definition of any offence, and to render him liable to a penal prosecution, but said that they were not aware that the clauses in question were capable of being so perverted under the provisions of the Code. (See section 83. The First Report of the Law Commissioners.)

We are bound to interpret the expression "in possession" according to section 27, but there is nothing in the Code which lays down that section 27 must be used to interpret the expression "become possessed." It is clear to me that section 27 does not express the complete thought of the legislature on the question of possession and it is competent to us to interpret the words "to become possessed" in accordance to the meaning that the general

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(1) (1896) 12 Times Reports 450.

(2) (1871) 3 N. W. P. Rep. 150.



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law has given to them. (See the observations of Holloway J. in 3 M. H. Ct. Reports, Appendix, Proceedings 22nd December, 1860). When a servant takes possession on behalf of the master, it does not necessarily follow that it is the master who takes possession. Suppose the servant takes wrongful possession, purporting to do so on behalf of his master, does the master become liable? The master is not liable in civil law, for acts wholly outside the servant's authority. He is not answerable if the servant takes upon himself, though on good faith, and meaning to further the master's interest, that which the master has no right to do, even if the facts were, as the servant thinks them to be: *Poulton v. London & South Western Ry. Co.* (1). Much less can the master be held to be criminally liable in those circumstances. It would be to pervert the meaning of the expression, to use the phrase of the Law Commissioners, to put such a construction in a penal statute. Possession in law is that of the master. The servant does not become possessed, although he may be in custody, or "in possession." Dishonest removal of money from the master's safe in which it has been kept by the servant, is removal from the master's possession. It is theft of the master's property, not of the servant. If the servant dishonestly removes the money from the safe, after having kept the money there, he may be guilty of theft, or of criminal breach of trust, according to circumstances. Possession involves the idea of proprietorship, the right to exercise power or control over the object possessed—*animus sibi habendi*. "Becoming possessed" of property involves the intention to possess (*animus possidendi*). A person picks up a coin in his shop dropped by a customer and puts it into his till with the intention of restoring it to the customer, but he does not thereby become possessed, although he is "in possession." The master becomes possessed, when he personally takes possession on his own account, or when he authorises the servant to take a thing for him, for his benefit, or on his account, or when he consents to or sanctions the retention of the thing received by the servant, or knowingly allows the servant to retain in custody for him. If there be prior authority to the servant, or arrangement with him to receive, the time when the servant receives, is the time when the master becomes possessed. In other cases, the time when the master comes to know or consents or allows the thing to remain with the servant, is the time when he becomes possessed. The master, for purposes of section 243, may

(1) (1867) L. R. 2 Q. B. 534.

oe in possession in two ways, personally or constructively through a servant, but the time when he becomes possessed, is I have endeavoured to explain, as above, in other words when it can be held that he was "conscious" of his possession. I hold therefore that the law was correctly put before the Jury. Since there was no evidence in this case of any prior authority given to the servant, or of any arrangement with him to receive the counterfeit coin, it was unnecessary to deal with the time of the servant's receipt. The accused produced the key of the safe and it was opened by him. It was all important to find, if he had at all come to know that the counterfeit coin was there. The attention of the Jury was prominently called to the point. If they so found, they were asked to consider whether he knew it at the time *he* became conscious of such possession. This became necessary having regard to the reading of the section by the defence.

It follows, that I hold,\* we cannot interfere with their verdict. I think it right to add, as the facts of the case have been discussed before us, I would not have convicted him if I had tried the case independently of a Jury.

*Babu Priyanath Sen* :—Attorney for the applicant.

*Government Solicitor* :—Solicitor for the Crown.

A. T. M.

*Accused acquitted.*

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## CRIMINAL REVISION.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and  
Mr. Justice Smither.*

SARAT CHANDRA MADAK AND OTHERS

v.

MOBARAK MALLIK AND OTHERS.\*

*Right to collect tolas, dispute as to—Criminal Procedure Code (Act V of 1898),  
Sec. 147, scope of.*

A dispute as regards a right to collect *tolas* (small perquisites) from a *hat* on one day every year, is one concerning the *right of use of any land* within the meaning of section 147 of the Code of Criminal Procedure.

*Dukhi Mullah v. Halway* (1) referred to.

\* Criminal Revision No. 532 of 1916, against the order of S. C. Ghosh, Esq., 1st Class Magistrate at Arambagh, dated the 10th April, 1916.

(1) (1895) I. L. R. 23 Calc. 55.

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The words used in section 147 are of wider and more general application than those in section 145 of the Code.

Rule obtained by the 2nd party.

Proceeding under section 147 of the Criminal Procedure Code

Application by the 2nd party praying that the order of the Deputy Magistrate of Arambagh, directing under section 147 of the Code of Criminal Procedure, the 1st party to collect *tolas* from the Dewanganj *hat* until any person objecting to such collection of *tolas* by the 1st party, obtains the decision of a competent Court adjudging him to be entitled to prevent such collection, may be set aside, and hence the Rule issued by the High Court.

The other material facts will appear sufficiently from the judgment.

*Babus Rishindra Nath Sarkar and Ramesh Chandra De* for the Petitioners.

*Babu Bibhuti Bhusan Saha* for the Opposite Party.

The judgment of the Court was delivered by

August, 17.

**Sanderson C. J.**—In this case the dispute was with reference to the right to collect *tolas*, or small perquisites, from Dewanganj *hat*: The first party on behalf of the local Mahomedans was claiming the right to collect the *tolas* only on one day every year, for performing a certain religious ceremony. The second parties who were Hindus were objecting to this, saying that the Mahomedans had no such right to collect *tolas* from the *hat* as alleged by the first party.

Now, the first ground upon which this Rule was issued was that the case was not one falling within section 147 of the Criminal Procedure Code, and, the reason why it is alleged that the case did not come within that section was that the dispute was not one concerning *the right of use of any land*.

Now, in our opinion it was a dispute concerning *the right of use of land*. As far as I can understand, the facts of this case show that the *hat* was held every week in the particular village: It was held always on the same vacant piece of ground somewhat about the middle of the village, and when the *hat* was held, people who wanted to sell their goods came and took up their position upon different places on this vacant piece of ground in the ordinary course of events. It may be described as a kind of market, and the place where it is held may be described as a kind of market-place. The Mahomedans were alleging that they had the right on one day in

the year to go upon this piece of land when the *hat* was held for the purpose of collecting from the people who were there, the shopkeepers I suppose, and also people who frequented the shops, gratuities for the purpose of performing a particular religious ceremony, and the dispute was with reference to the right of the Mahomedans to do that.

The question is whether that is a dispute concerning the right of use of any land.

The first observation I would make is that the words which are used in section 147 of the Criminal Procedure Code are not the same as those used in section 145 of the same code. The words used in section 145 are these "*a dispute likely to cause a breach of the peace exists concerning any land or water.*" It has been held by this Court that what is contemplated there is *immovable property*, something of which actual physical possession can be given and taken. But when you come to section 147, as I have already pointed out, the words used are not "concerning land or water", but "concerning the right of use of any land or water." The words used are of wider and more general application. The marginal note describing this section is "Disputes concerning easements &c." It has been held by this Court that the words of a section cannot be limited by the marginal note in accordance with the usual rule of construction of statutes. It has, however, been held that the word "easements" was not used in this section in the limited sense in which it is used in English Law. It has been expressly so held by this Court in the case of *Dukhi Mullah v. Halway* (1) (and the part of the judgment to which I wish to refer is at page 59), that the word 'easement' was not used in a limited sense as in English law: and the judgment goes on to point out "In the first place the section speaks of 'easement etc,' and in the second place there is nothing to show that the British Indian Legislature uses the term "easements" in the restricted sense in which it is used in English law so as to exclude profits *a prendre*, while on the contrary a reference to the definition of *easements* in the Limitation Act (XV of 1877, section 3) which was passed four years before the Criminal Procedure Code, and in the Easements Act (V of 1882, section 4), passed in the same year as the Criminal Procedure Code a little more than a month before, shows that the term is used as including profits *a prendre*. There is then nothing to show that the words 'the right to do any thing in or upon tangible immovable property' in section 147 do not include the right to fish in a *jhil*."

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(1) (1895) I. L. R. 23 Calc. 55 (59).

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Now, those words "the right to do any thing in or upon any tangible immovable property" which had been in section 147 of the previous Criminal Procedure Code are not to be found in the corresponding section of the present Code and the material words now are "concerning the right of *use of any land or water.*" Having regard to the ordinary meaning of the words and to that decision, I am of opinion that the words are wide enough to include such a right of use of the land as is claimed by the Mahomedans in this case, namely, the right to go upon the land for one day in the year for the purpose of collecting gratuities to be used for a certain religious purpose.

With regard to the second point, this was of an entirely different nature. It was based on the ground that there was no finding as to the last exercise of the right. This arises in this way : There is a proviso to section 147 which says this, "Provided that no order shall be passed under this section permitting the doing of anything where the right to do such thing is exercisable at all times of the year, unless such right has been exercised within three months before the institution of the inquiry ; or where the right is exercisable only at particular seasons or on *particular occasions*, unless the right has been exercised during the last of such seasons or occasions before such institution." The latter part of this proviso applies to this case ; and, it is alleged on behalf of the petitioners, that there is no finding here that this particular right claimed by the Mahomedans was exercised during the last of such seasons or occasions before the institution of the inquiry ; and, therefore, he argues that the Magistrate had no jurisdiction to make the order.

It is quite true that there is no express finding to that effect in his judgment : But we have got his explanation and from it we find that 'although there had been opposition' by the petitioners, that opposition was not successful : and, the evidence of the witnesses for the first party, that is the Mahomedan party, showed that the right was exercised by the first party Mobarak Mallik during the last three years : and that witnesses for the first party proved that the right had been exercised by the first party upto the last year and that they could not, only this year collect any *tola* owing to violent opposition by the second party : and, then the Magistrate goes on to refer to the particular witnesses whose evidence I need not specifically mention. Now, if the evidence as to these facts was accepted by the Magistrate, as I gather from his explanation he intended to do, he in fact had jurisdiction. The only thing is that he did not expressly state that finding in his judgment. The only

result of making the Rule absolute asking the Magistrate to reconsider the matter would be to ask him to insert that, the effect of which he had stated in his explanation. My learned brother and myself are satisfied on the facts that the Magistrate had jurisdiction to make the order : and, we do not think that that is a good ground for making the Rule absolute.

With regard to the third point, that there is no finding that there was a likelihood of a breach of the peace, in my opinion there is a finding to that effect. If it is not express it is certainly implied. Further than that, it was not one of the grounds on which the Rule was granted.

For these reasons, we think that the Rule must be discharged.

A. N. R. C.

*Rule discharged.*

CRIMINAL.

1916.

Sarat  
v.

Mobarak.

*Sanderson, C. J.*

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr.  
Justice Richardson.*

CHHAKMAL CHOPRA AND ANOTHER,

v.

THE KING-EMPEROR.\*

CRIMINAL.

1916.

*August, 10.*

*Indian Stamp Act (II of 1899), Section 64, cl. (c)—“Any other act,” meaning of—Document insufficiently stamped—Prosecution under the section, if maintainable.*

The words “any other act” in clause (c) of section 64 of the Indian Stamp Act, mean an act of a like nature to those which are specified in clauses (a) and (b); and thus the mere fact that a person puts a stamp on a document, which he knows not of proper value, would not bring the case within clause (c) of the section.

*Queen-Empress v. Somasundaram Chetti* (1) referred to.

Revision under section 439 of the Code of Criminal Procedure.

Application for quashing proceedings under section 64 clause (c) of the Indian Stamp Act, pending against the petitioners in the Court of the Sudder Sub-Divisional Magistrate of Rungpur.

\* Criminal Revision No. 670 of 1916, for quashing proceedings pending in the Court of Mr. B. N. Mukherjee, Sudder Sub-Divisional Magistrate of Rungpur.

(1) (1899) I. L. R. 23 Mad. 155.

CRIMINAL.

1916.

Chhakmal

v.

King-Emperor.

August, 10.

The material facts and arguments will appear sufficiently from the judgment of Sanderson, C. J.

*Babu Monmotho Nath Mukherjee* for the Petitioners.

*Mr. Gregory* for the Crown.

The following judgments were delivered:

**Sanderson C. J.**—We think that this Rule should be made absolute.

The charge against the two petitioners was under section 64 (c) of the Indian Stamp Act ( II of 1899 ) which says that “ Any person who, with intent to defraud the Government .....; does any other act calculated to deprive the Government of any duty or penalty under this Act shall be punishable with fine which may extend to five thousand rupees.”

Now, what happened in this case was that the petitioners alleged that they had lent money to one Lal Mahammed Barkundaz, and Lal Mahammed had signed an undertaking in one of the petitioner's books to this effect : “ I shall pay interest on this *hath-chitta* up to date of realization at the rate of Rs. 3 per cent. per mensem. Sd. Sri Lal Mahamed”. That document was stamped with one anna stamp. When it was necessary for the petitioners in certain proceedings against Lal Mahammed to put in this document an objection was taken by the officer of the court that it was not duly stamped ; and, the result was that the petitioners had to pay the proper amount of stamp and penalty which accounted to Rs. 5. Then the Collector, when he had this matter brought to his attention, directed that the petitioners should be prosecuted under the section which I have read and summons was issued by the Magistrate to the petitioners in that respect.

A Rule has been obtained in this Court by the petitioners on the grounds, first, that on the facts and circumstances of the case no offence under section 64 (c) had been disclosed and secondly, that there being nothing to show that there was an intention of evading the payment of the proper duty, the Collector ought not to have directed a prosecution in the case.

The act relied on by Mr. Gregory, who appears on behalf of the crown is this : He says that the petitioners who were people carrying on money lending business must have known when they put the stamp upon the document, that it was not a stamp of sufficient value : and therefore they must have intended to evade payment of the proper duty.

The first point that was taken by Mr. Monmotho Nath Mukherjee

was that it was not the duty of the petitioners to put on the stamp at all, and that it was the duty of the debtor to put on the stamp. But inasmuch as it was an agreement, and the stamp required was that applicable to an agreement, there is no provision in the Stamp Act as far as I am able to find, which provides that in such a case it is the duty of the debtor to put on the stamp and inasmuch as this acknowledgment was made in the books of the petitioners themselves I think it is fair to assume that in all probability they were the parties to put the stamp upon the document.

Then the learned Vakil for the petitioners takes a further point : He says that the mere fact of putting a stamp upon a document which is not of proper value, even though the party who puts that stamp knows that it is not of the proper value, is not an act which comes within clause (e) of section 64. I agree with him. Clause (c) comes after two other clauses ; and, the section must be read as a whole to understand the meaning of clause (c). The section runs thus : "Any person who with intent to defraud the Government (a) executes any instrument in which all the facts and circumstances required by section 27 to be set forth in such instrument are not fully and truly set forth ; or, (b) being employed or concerned in or about the preparation of any instrument neglects or omits fully and truly to set forth therein all such facts and circumstances ; or (c) does any other act calculated to deprive the Government of any duty or penalty under this Act : shall be etc. etc." The learned pleader's argument is that in construing clause (c) it is right to say that "any-other act" must be taken to mean an act of a like nature to those which are specified in clauses (a) and (b). I think that it is the proper construction to put upon the section : and, if that be so, then the mere fact that a person puts a stamp on a document, which he knows not of proper value, would not in my judgment come within clause (c) of section 64.

It is argued by the learned Counsel for the Crown that unless the construction for which he contends, be put up on clause (c), it would be a very serious thing for the Revenue authorities, and they will have no means of punishing a man for wrongly stamping a document. But I do not think that weighs with us very much, because if one looks at section 62 (1) paragraph (b) one finds that at all events a person, who signs a document which is chargeable with duty without the same being duly stamped is liable to be prosecuted for an offence under that section ; and the Revenue Authorities, if they think right can proceed against a person who signs such a document without a proper stamp being put upon it. I am con-

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firmed in the judgment at which I have arrived by the decision of the Madras High Court in the case of *Queen Empress v. Soma-sundaram Chetti* (1). It is true that the learned Judges there were not concerned with the particular section, but they were considering section 67 which practically corresponds to section 68 of Act II of 1899 ; and, the reasoning which the learned judges applied in that case is exactly the reasoning which appeals to me in this case.

For these reasons, I think that the Rule should be made absolute.

Richardson J.—I have come to the same conclusion. I think that the act charged is not an act which comes within clause (c) of section 64 of the Indian Stamp Act.

A. N. R. C.

*Rule made absolute.*

(1) (1899) I. L. R. 23 Mad. 155.

## CRIMINAL REFERENCE.

*Before Sir Asutosh Mookerjee, Knight, Judge and Mr Justice Sheepshanks.*

ETIM HAJI

v.

HAMID.\*

CRIMINAL.

1916.

May, 18.

*Criminal Procedure Code (Act V of 1898) Sec. 247, 438.—Complainant, non-appearance of, though present in Court—Transfer of the case, complainant not aware of—Penal Code (Act XLV of 1860), Sec. 426.*

On a complaint, the accused was summoned for trial under section 426 of the Indian Penal Code. On the date of hearing both parties appeared with their witnesses before the Deputy Magistrate who, however, transferred the case to another Bench of Magistrates. Later on in the day the case was taken up by that Bench but the complainant, though he was present in the Court with his witnesses, could not appear as he was not aware of the transfer of his case. The Magistrates acquitted the accused under section 247 of the Code of Criminal Procedure :

*Held*, that section 247 of the Code of Criminal Procedure does not apply in such a case.

Reference under section 438 of the Code of Criminal Procedure.

The accused was acquitted under section 247 of the Code of Criminal Procedure.

\* Criminal Reference No. 72 of 1916 (undefended) by F. W. Robertson Esq. Additional District Magistrate Dacca, dated the 9th May 1916 against an order of Mr. R. N. Das and Mr. K. Azimullah, Honorary Magistrates, Dacca, dated the 7th March, 1916.

The judgment of the Court was as follows :

This is a reference by the Additional District Magistrate of Dacca under section 438, Criminal Procedure Code. The petitioner Etim Haji lodged a complaint against one Hamid and others under sections 426 and 447, Indian Penal Code. After a preliminary enquiry an order was passed on the 10th February, 1916, summoning the accused Hamid for trial of an offence under section 426, Indian Penal Code. The case was fixed to be heard on the 7th March, 1916 in the court of Mr. D. M. Sen, Deputy Magistrate Dacca. On that date, both the complainant and the accused appeared before Mr. Sen with their respective witnesses. The Deputy Magistrate thereafter recorded the following order in the order sheet : "Five witnesses for prosecution and five witnesses for defence. To Sadar Bench for favour of disposal." The case was taken up later on in the day by Mr. R. N. Das and Mr. K. Azimullah who formed the Bench of Magistrates to whom the case had been transferred. The complainant and his Muktears were called for several times, but were not found. The Magistrates accordingly recorded the following order : "accused present ; complainant absent ; accused acquitted under section 247, Criminal Procedure Code." Shortly after this the complainant, it is said appeared before the Magistrates and prayed that the case might be revived, as he was not aware of the order of transfer and was waiting with his witnesses in the Court of Mr. Sen in the belief that his case would be tried there. The Magistrates stated that as an order under section 247 had already been recorded, the case could not be revived by them. The complainant then applied to the District Magistrate who has referred the matter to this Court with the recommendation that the case should be revived. We are of opinion that his recommendation should be accepted. We agree with him that section 247 has not been rightly applied to this case, as the complainant was present in Court with his witnesses on the date fixed for trial and was not aware that the case had been transferred to other Magistrates. This view is supported by the decision in *Romanath Bal v. Behari Bag* (1). In fact in the case before us, the order of transfer showed on the face of it that the complainant was present with his witnesses. This was possibly overlooked by the Magistrates, when they made the order under section 247. We accordingly, set aside the order under section 247 and direct that the trial do proceed in accordance with law.

C. R. C.

*Reference accepted.*

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## CIVIL RULE.

*Before Mr. Justice D. Chatterjee and Mr. Justice Newbould.*

CIVIL.

1916.

*June, 27.*

BEPIN BEHARI SHAHA

v.

ABDUL BARIK AND OTHERS.\*

*Civil Procedure Code (Act V of 1908) O. IX, Rr. 4, 9 and O. XLVII, r. 1.*  
*—Application for restoration—Alternative prayer for review—Provincial*  
*Small Cause Courts Act (IX of 1887), Sec. 17—Deposit of security.*

A suit was dismissed for the plaintiff's default in the presence of the defendant. The plaintiff then made an application under O. IX rules 4 and 9 for restoration and rehearing. Again there was a default and the case was dismissed in the presence of the defendant. The plaintiffs then again applied for restoration under O. IX. rule 9 with an alternative prayer for treating the application as an application for review :

*Held*, that an application for the restoration of a case under O. IX rules 4 and 9 may be treated as an original application which has to be numbered as a separate miscellaneous case and decided upon evidence on the merits.

*Deljan Nickha Bibee v. Hemanta Kumar Roy* (1) followed.

*Held further*, that O. XLVII, r. 1 of the Code of Civil Procedure applies to all orders of the Court which may be reviewed under certain circumstances.

The provisions of section 17 of the Provincial Small Cause Courts Act with regard to deposit of security have no application to a miscellaneous application of this kind.

Application for Revision under section 115 of the Code of Civil Procedure and section 15 of the Charter Act.

Application for restoration and rehearing of a suit.

The material facts of the case appear from the judgment.

*Babu Jitendra Nath Ray* for the Petitioner.

*Babu Manmatha Nath Ray* for the Opposite Party.

The judgment of the Court was delivered by.

**D. Chatterjee, J.**—The plaintiff brought a suit in the Small Cause Court. The suit was dismissed for the plaintiff's default in the presence of the defendant. The plaintiff then made an application under order IX, rules 4 and 9 for restoration and rehearing of the case. On this occasion also, there was a default and then the order dismissing this case was made in the presence of the defendant's pleader. There was again an application made under order

\* Civil Rule No. 166 of 1916 against the decision of S. C. Ghosh Esq., Munsiff, 4th Court at Dacca, dated the 15th January, 1916.

(1) (1915) 19 C. W. N. 743.

IX, rule 9 for the rehearing of the case. The learned Munsiff held order IX, rule 9 did not apply and, therefore, dismissed the application.

It appears that the plaintiff made an application also for treating it as an application for review. On that application also, the learned Judge said "such application does not lie." We are unable to see the justification of such orders.

In the first place, we do not think that order IX, rule 9 does not apply; and in arriving at this conclusion, we follow the case of *Deljan Nichha Bibee v. Hemanta Kumar Ray* (1). There it was held that order IX, rule 9 was applicable to a case in which an application for setting aside a sale, had been dismissed. The application for setting aside the sale was treated there as an original proceeding. In this case also, in a similar way, the application for the restoration of the case under Order IX, rules 4 and 9 may be treated as an original application although no fresh parties are interested in the case. The proceeding is initiated by an application which has to be numbered as a separate miscellaneous case and decided upon evidence.

In this view of the case, we think that the learned Munsiff ought to have considered the application on the merits.

Then, as regards the alternative prayer for treating the application as an application for review, we do not understand why the learned Munsiff says that order XLVII rule 1 has no application. That rule seems to apply to all orders of the Court which may be reviewed under certain circumstances.

The objection taken by the opposite party was that there was no deposit under section 17 of the Small Cause Courts Act. Section 17 of the Small Cause Courts Act, however, speaks of deposits where there has been an application for review of judgment in cases where an *ex parte* decree has been passed, or a review of judgment evidently in cases where there has been a judgment deciding the case. We do not think that the provisions of section 17 with regard to deposit of security have any application to a miscellaneous application of this kind. If they had any application, the learned judge might have asked the petitioner to give security or to deposit the amount instead of saying that the application does not lie.

In this view of the case, we make the Rule absolute and direct that the application should be decided on the merits.

We make no order as to costs.

S. C. R. C.

*Rule made absolute.*

(1) (1915) 19 C. W. N. 758.

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1916.

Bepin

v.

Abdul.

*D. Chatterjee, J.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.*

CIVIL.

1916.

August, 22, 25, 29.

SASI BHUSHAN BOSE

v.

MAHARAJA SIR MANINDRA CHANDRA NANDY  
AND OTHERS.\*

*Court-fee—Court-fees Act (VIII of 1870), Sec. 7 (IV) (f)—Administration suit, nature of—Valuation for jurisdiction.*

An administration suit by a creditor is an action for an account within the meaning of section 7 (IV) (f) of the Court-fees Act. In such a suit, the plaintiff is entitled to place his own valuation on the relief claimed and the valuation for purposes of jurisdiction is identical with the valuation for purposes of Court-fees.

*Khatija v. Adam* (1) and *Ma Ma v. Ma Hmon* (2) referred to.

An administration suit is in essence for an account and application of the estate of the debtor for the satisfaction of the debts of all the creditors; the whole administration and settlement of the estate are assumed by the Court, the assets are marshalled, and the decree is made for the benefit of all the creditors. Creditors other than the plaintiff, may come in under the decree and prove their debts and obtain satisfaction of their demands, equally with the plaintiff in the suit, and, under such circumstances, they are treated as parties to the suit. If they decline so to come in, they will be excluded from the benefit of the decree, and yet they will, from necessity, be considered as bound by the acts done under the authority of the Court. Creditors, who have obtained decrees on their claims, should not be formally joined as plaintiffs, unless, it was alleged and proved that their interests would be in serious jeopardy, if the plaintiff had the conduct of the proceedings.

*Vasanji v. Ismail* (3) referred to.

But where one creditor sues on behalf of himself and the others for administration of the estate of the debtor, the defendant may, at any time before judgment, have the action dismissed on payment of the plaintiff's debt and all the costs of the action.

*Pemberton v. Topham* (4); *Holden v. Kyneston* (5) and *Manton v. Roe* (6) referred to.

Application by the plaintiff.

Suit for administration of the debtor's estate.

\* Civil Rule No. 372 of 1916, against an order of Babu Binod Bihari Mitra, Subordinate Judge of 24-Perganas, dated the 6th April, 1916.

(1) (1915) I. L. R. 39 Bom. 545; 17 Bom. L. R. 574.

(2) (1906) 4 L. B. R. 279.

(3) (1909) I. L. R. 34 Bom. 420; 11 Bom. L. R. 1054.

(4) (1838) 1 Beav. 316.

(5) (1840) 2 Beav. 2

(6) (1844) 14 Sim. 353.

The material facts and arguments appear from the judgment of Mr. Justice Mookerjee. The question at issue was as to the amount of Court-fees to be paid in the administration suit.

*Babus Joges Chunder Roy, Gobind Chunder Dey Roy and Upendra Kumar Roy* for the Petitioner.

*Dr. Dwarka Nath Mitter* for the Opposite Party.

*Babu Ram Charan Mitra* for the Secretary of State for India.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee J.**—We are invited in this Rule to set aside an interlocutory order in an administration suit instituted by a creditor. The order in question calls upon the plaintiff to amend his plaint in the manner following, namely, to ascertain all the creditors of his debtor and the sums payable to them, to alter the valuation of the claim by the addition of the amount so ascertained to the amount due to himself, and to pay Court fees *ad valorem* on the amended valuation. The plaint recites that the first defendant, Amarnath Bose, on the 4th April, 1911 borrowed from the plaintiff a sum of Rs. 1000 on a promissory note repayable on demand with interest at 18 per cent per annum, that he has neither paid the principal, nor the interest, and that, on the 23rd September 1911, he executed a trust deed in favour of the second defendant the Maharaja of Cossimbazar, whereby he transferred all his immovable properties to the Trustee with direction to pay up all his creditors inclusive of the plaintiff. The plaint further recites that the Trustee has taken possession of the trust properties, but has not paid the plaintiff his dues, and so far as the plaintiff can ascertain, the Trustee has not paid up the other creditors of the first defendant. The plaintiff, accordingly, prays that the estate may be administered, that an account may be taken of the trust properties and their income, that a Receiver may be appointed for the purpose, that the creditors may be ascertained by issue of public notice, and that their debts may be determined and paid. The plaintiff also asks for leave to conduct the suit on behalf of all the creditors, with liberty to the other creditors to join as co-plaintiffs, should they so desire. The plaintiff alleges that the sum due to him on the date of the commencement of the suit was Rs. 1540, and that the sums payable to the other creditors would exceed Rs. 5000. He valued the suit for purposes of jurisdiction at Rs. 6540 but paid Court fees on his own claim only, viz. Rs. 105 on a valuation of Rs. 1540. He paid an additional sum of Rs. 10 apparently on the ground that the

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claim for administration could not be estimated at a money value within the meaning of Schedule II, Art. 17 (VI) of the Court Fees Act 1870. The suit was instituted on the 3rd April 1914, and after it had advanced considerably it came up for hearing on the 6th April 1916 when a preliminary objection was taken on the question of Court fees payable on the plaint. It may be stated that the first defendant, the debtor, had died meanwhile, and his infant heirs had been brought on the record on the 29th March 1915. The Subordinate Judge took up the question of Court fees and made the order we are now called upon to revise. The question raised is one of first impression, and we have had the advantage of arguments not only on behalf of the plaintiff and the Trustee defendant, but also by the Senior Government Pleader who appeared on behalf of the Secretary of State as a question of the Revenues of the Crown was concerned.

It is plain that the Court Fees Act, 1870, does not in express terms provide for an administration suit. We must consequently consider the nature of an administration suit, which is explained in Standard Treatises on Equity Pleading and Chancery Practice. Lord Redesdale (Pleadings in Chancery, page 167) points out that, as early as 1766, in *Corry v. Triest* (1), some of a number of creditors, parties to a Trust Deed for payment of debts were permitted to sue, on behalf of themselves and the other creditors named in the deed, for execution of the Trust, although one of those creditors could not in that case have sued for a single demand without bringing the other creditors before the Court: *Worraker v. Pryer* (2). This seems to have been permitted purely to save expense and delay; if a great number of creditors, thus especially provided for by a deed of trust, were to be made plaintiffs, the suit would be liable to the hazard of frequent abatements; and if many were made defendants, the same inconvenience might happen and additional expense would unavoidably be incurred. Reference may, in this connection, be made to the decisions in *Routh v. Kinder* (3); *Boddy v. Kent* (4); *Weld v. Bonham* (5); *Douglas v. Horsfall* (6); *Hansford v. Storie* (7); *Peacock v. Monk* (8); *Newton v. Egmont* (9); *Atherton v. Worth* (10); *Richardson v. Hastings* (11); *Smart v. Bradstock* (12); *Powell v. Wright* (13).

(1) (1766) Unreported.

(3) (1789) 3 Swans 144 N.

(5) (1824) 2 Sim. &amp; Steu. 91.

(7) (1825) 2 Sim. &amp; Steu. 196.

(9) (1831) 4 Sim. 574; (1832) 5 Sim. 130.

(11) (1844) 7 Beav. 325.

(2) (1876) 2 Ch. D. 109.

(4) (1816) 1 Mer. 361.

(6) (1825) 2 Sim. &amp; Steu. 184.

(8) (1790) 1 Ves. 131.

(10) (1674) 1 Dick. 375.

(12) (1844) 7 Beav. 500.

(13) (1844) 7 Beav. 444.

Reference may also be made to an instructive exposition given by Story in his work on Equity Pleadings (sections 99-103 (a) and 216-218, where it is pointed out that the suit must be framed as on behalf of all the creditors, as otherwise accounts may have to be taken *de novo* in separate suits by different claimants *Leigh v. Thomas* (1). The suit is in essence for an account and application of the estate of the debtor for the satisfaction of the dues of all the creditors; the whole administration and settlements of the estate are assumed by the court, the assets are marshalled, and the decree is made for the benefit of all the creditors: see Civil Procedure Code, 1908 O. 20 R. 13; App. A. 41; App D. 17-20; *Good v. Blewitt* (2); *Adair v. New River Co.* (3); *Cockburn v. Thompson* (4). Creditors other than the plaintiff may come in under the decree and prove their debts and obtain satisfaction of their demands, equally with the plaintiff in the suit, and, under such circumstances, they are treated as parties to the suit. If they decline so to come in, they will be excluded from the benefit of the decree, and yet they will, from necessity, be considered as bound by the acts done under the authority of the Court. *Hallett v. Hallett* (5) where Chancellor Walworth expounds the whole doctrine with great clearness. But although such is the nature of the suit, it is well settled that where one creditor sues on behalf of himself and the others for administration of the estate of the debtor, the defendant may, at any time before judgment, have the action dismissed on payment of the plaintiff's debt and all the costs of the action [*Pemberton v. Topham* (6); *Holden v. Kynaston* (7); *Manton v. Roe* (8)]; and this principle was recently applied in the case of *Athalur Malakondiah v. Lakshminarasimhalu Chetty* (9). An administration suit by a creditor is, consequently, an action for an account within the meaning of section 7 (IV) (f) of the Court Fees Act, and this was the view adopted in *Khatija v. Shaik Adam* (10). In such a suit, the plaintiff is entitled to place his own valuation on the relief claimed: *Ma Ma v. Ma Hmon* (11). In the present instance, he values the relief at Rs. 1540 and that valuation is neither arbitrary nor fictitious. We are not able to appreciate on what principle the plaintiff can be called upon to

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(1) (1751) 2 Ves. Sen. 313.

(2) (1807) 19 Ves. 336 (339).

(3) (1908) 11 Ves. 444.

(4) (1809) 16 Ves. 327.

(5) (1829) 2 Paige 19.

(6) (1838) 1 Beav. 316.

(7) (1840) 2 Beav. 204.

(8) (1844) 14 Sim. 353.

(9) (1914) 26 M. L. J. 312.

(10) (1915) 1 L. R. 39 Bom. 545; 17 Bom. L. R. 574.

(11) (1906) 4 L. B. R. 279.



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ascertain in advance all the creditors of his debtor and their dues, and value the suit accordingly. That in essence is the fundamental point for determination in the suit itself, and it is inconceivable how it can be decided by the plaintiff before trial. We do not feel pressed by the argument of the Senior Government Pleader that if the plaintiff is allowed to value the suit according to the relief he seeks, the Revenues of the crown will suffer, because the other creditors of the debtor will obtain relief without payment of Court fees. There need not, in our opinion, be room for such apprehension. When, after the preliminary decree has been made, and creditors have been invited to establish their claims, if any, against the debtor, each creditor, who puts forward a claim not already transformed into a judgment debt, may well be required to pay Court fees *ad valorem* on his application, as if it were a plaint in a suit for the recovery of the sum he claims. Such a procedure can be sustained on the analogy of section 11 of the Court Fees Act. The only real difficulty in connection with the matter is the question of jurisdiction. If the suit is, as we think it must be, treated, as a suit for "account," within the meaning of section 7, (IV) (f) of the Court Fees Act, the valuation for purposes of jurisdiction must be identical, under section 8 of the Suits Valuation Act, with the valuation for purposes of Court Fees. It is thus conceivable that the suit so valued on the basis of the claim of the plaintiff, may be instituted in the Court of the lowest grade of pecuniary jurisdiction, and a claim may thereafter be preferred by a creditor who would, in respect of his claim, institute a suit only in a Court of higher grade. The remedy in such a case would be the transfer of the suit at that stage from the Court of lowest grade to the Court competent to try a claim of enhanced value. This course was in fact adopted in a somewhat similar case: See the decision in *Bhupendra Kumar v. Purna Chandra* (1). The view we take thus obviously avoids all anomaly and at the same time removes all hardship. In the case before us, there is in reality no difficulty, actual or potential. Since the institution of the suit, several creditors of the first defendant have put forward claims of a value such as can be tried only by Subordinate Judges. The suit is, therefore, properly triable by a Subordinate Judge, and as the aggregate value of the claims already put forward exceeds ten thousand rupees, the appeal against the decree will lie, not to the District Judge but to this Court. We may here point out that the claimants, who

(1) (1910) 13 C. L. J. 132; I. L. R. 43 Calc. 650; 15 C. W. N. 506.

subsequently appeared, should not have been formally joined as plaintiffs, specially as some of them are said to have already obtained decrees on their claims, unless, indeed, it was alleged and proved that their interests would be in serious jeopardy if the plaintiff had the conduct of the proceedings: *Vassonji v. Ismail Khan* (1). The proper course would have been to allow them an opportunity to prove their claims and to participate in the distribution of the assets of the estate. Our conclusion is that it was not obligatory upon the plaintiff to pay Court fees on a higher valuation than the amount claimed by him, and that the plaint is not open to objection on the ground that it is insufficiently stamped.

The result is that this Rule is made absolute and the order of the Court below discharged. The records will be returned to the Subordinate Judge, so that he may proceed with the trial of the suit on the merits on as early a date as practicable. The petitioner will have his costs of this rule from the estate of his debtor in the hands of the Trustee defendant. We assess the hearing fee at two gold mohurs.

A. T. M.

*Rule made absolute.*

(1) (1909) I. L. R. 34 Bom. 420 ; 11 Bom. L. R. 1054.

## APPELLATE CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir  
Asutosh Mookerjee, Knight, Judge.*

REAJUDDI BEPARI

v.

CHAND BAKSHA HAJI.\*

*Landlord and tenant—Tenant, if can contest Landlord's title—Adverse possession,  
title by—Lessee, if can acquire such title against his lessor—Non-payment of  
rent, if creates adverse possession.*

A tenant cannot dispute the landlord's title without first going out of occupation, and thereby making it clear that he intended to dispute the title of his landlord.

\* Letters Patent Appeal, No. 47 of 1915, against the decision of Mr. Justice Walmsley, dated the 11th March, 1915, in Appeal from Appellate Decree, No. 4168 of 1913, against the decree of F. W. Ward Esq. District Judge of Tipperah, dated the 21st April, 1913, affirming that of Babu Nara Nath Mukherjee, officiating Munsiff, 4th Court, at Chandpur dated the 29th June, 1912.

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*Doe dem Joseph Manton v. Austin* (1) referred to.

Where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor pending the term of his lease, unless he distinctly asserts such a title to his knowledge and gives him notice that he asserted such a title.

*Madan Mohan Gossain v. Kumar Rameswar Malia* (2) followed.

Failure to pay rent to the lessor by the lessee does not alone operate to create in favour of the lessee a title by adverse possession.

Appeal by the Plaintiff.

Suit for declaration of title to and recovery of khas possession of three plots of land.

The material facts will appear sufficiently from the judgment of Walmsley J.

*Babu Jatindra Mohan Ghose* for the Appellant.

*Babu Satis Chunder Ghose* for the Respondent.

The following judgment was delivered by

**Walmsley, J.**—The plaintiff brought this suit for declaration of his title to three plots of land and for recovery of khas possession. About one of the plots there was no dispute between the parties. Regarding the second plot the plaintiffs have been successful in both the lower Courts. The present appeal relates to the third plot. The learned Munsiff dismissed the suit with regard to this plot, and on appeal to the learned District Judge the Munsiff's order was upheld. The learned Judge has written a judgment which is so brief as to be obscure, and to understand the facts it is necessary to go to the judgment of the Munsiff. It appears that one Budhai Chowkedar was raiyat of this plot; in 1291 he sold his interest to Baksi Pradhania and Felu Sikdar, and became their under-raiyat; then in 1296 Budhai sold his interest to Abdul Ali, father of defendant 4, and Abdul came into possession. Next defendant No. 1 (who is the only defendant to contest the suit) bought Abdul's interest in 1300. Finally in 1311 the plaintiff bought from Baksi Pradhania and Felu's son such interest as they had. The learned Munsiff found that Abdul Ali had only the under-raiyati interest to sell, but that the Kabala did not describe the interest as that of an under-raiyat, and that ever since the date of the purchase, that is since 1300 B. S. the first defendant has been holding the land adversely, first to Baksi and Felu and then to the plaintiff. The learned District Judge on appeal upheld the finding of the first Court.

(1) (1832) 9 Bingham, 41.

(2) (1907) 7 C. L. J. 615.

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It is now contended by the learned Vakil for the plaintiff appellant that on the findings recorded by the Munsiff he is entitled to a declaration of his raiyati right in the land and his right to recover rent from defendant No. 1 as his under-raiyat, and reference is made to the case of *Ishwari Chandra Mitter v. Raja Ramranjan Chakrabutty* (1). Reliance is placed in particular on the passage at page 135 running "where such claim is restricted to a limited interest, in the property, the dispossession is limited to that extent only." But as I understand the findings of the lower Courts it is that the defendant's possession has been adverse to all interest on the part of the plaintiff and his predecessor. On that view the principle of the ruling quoted does not apply to the present case, and I hold that the learned District Judge was right in regarding the plaintiff's suit in respect of the plot now in dispute as barred by limitation and I therefore dismiss this appeal with costs.

Against this decision the plaintiff appealed under section 15 of the Letters Patent.

*Babu Jatindra Mohon Ghose* for the Appellant.

*Babu Anilendra Nath Roy Choudhury* (for *Babu Satis Chunder Ghose*) for the Respondent.

The following judgments were delivered :

**Sanderson C. J.**—In this case I think the appeal should be allowed.

It appears that the plaintiff purchased the *raiya*ti interest in the land from Baksi Pradhania and Felu Sikdar. The under-raiyati interest became vested by a series of transactions in a man called Abdul Ali, and through Abdul Ali the under-raiyati interest became vested in defendant No. 1 in respect of plot No. 3, which is the only plot regarding which this appeal is made.

Now, apparently Abdul Ali purported to sell the raiyati interest, but it has been found by the Court below as a fact, which we must accept, that he had only the unner-raiyati interest at the time of the sale. Therefore, as between him and the defendant No. 1, he was able to pass nothing more than the under-raiyati interest. The defendant No. 1 went into possession in the year 1893 in consequence of this purchase from Abdul Ali. Therefore, it must be taken for the purpose of this appeal that he entered upon the land in the capacity of an under-raiyat. The suit has been dismissed in respect of this plot on the ground that the defendant No. 1 has thus been in possession of this plot from 1893 down to the institution of

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the suit, that is, more than twelve years. In my judgment, in the circumstances of this case, that is not a good ground for the dismissal of the suit.

This matter may be looked at perhaps from two points of view. If it is looked at from the point of view of the English law, the defendant No. 1 being the under-raiyat of the plaintiff who had the raiyati interest, the defendant No. 1 could not dispute his landlord's title without first going out of occupation. We had occasion the other day to deal with this matter (1) and I referred to the case of *Doe dem Joseph Manton v. Austin* (2), where Chief Justice Tindal said, "A tenant shall not contest his landlord's title : on the contrary, it is his duty to defend it ; if he objects to such title, let him go out of possession." Looked at from this point of view of the English law, if the defendant, the under-raiyat, wished to dispute the title of the raiyat, the plaintiff, he ought to have gone out of possession, and thereby made it clear that he intended to dispute the raiyat's title.

On the other hand, it may be looked at from another point of view, namely that laid down by Mr. Justice Brett in the case of *Madan Mohan Gossain v. Kumar Rameswar Malia* (3). The head-note correctly, I think, represents the passage in the judgment to which I desire to refer, and is as follows : where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor pending the term of the lease unless he distinctly asserts such a title to his knowledge and gives him notice that he asserted such title." If we look at this matter from that point of view, there is no evidence whatever that the defendant either when he went into possession of plot No. 3, or after he went into possession of that plot, at any time asserted title, so that it came to the landlord's knowledge that he, the defendant, was occupying the land not as under-raiyat having obtained the interest of Abdul Ali, but as owner asserting his title adversely to the plaintiff in this case. Whether we look at it from the point of view of English law or whether we looked at it from the point of view of the law laid down in the case in this Court, to which I have referred, there is nothing to show that the occupancy of the defendant had ceased as that of a tenant and became that of an adverse possessor. Perhaps, it is only right to mention that failure to pay rent to the lessor by the lessee does not alone operate to create in favour of the lessee a title by adverse possession. It is true that no rent has been paid by the defendant to the plaintiff, but from the point of view of the

(1) see *Bhaiganta Bewa v. Himmat Bidyakar* (1916) 24 C. L. J. 103.—Rep.

(2) (1832) 9 Bingham, 41.

(3) (1907) 7 C. L. J. 615.

law laid down in the above mentioned case, it will not operate as a defence for defendant No. 1.

For these reasons I think that the learned Judge was wrong in dismissing the suit of the plaintiff as regards plot No. 3 altogether. In my judgment, the plaintiff is entitled to a declaration that his position is that of a raiyat and the position of the defendant No. 1 is that of an under-raiyat under him, and that the plaintiff is entitled to rent on account of plot No. 3, from defendant No. 1.

The plaintiff is not entitled in this suit to a decree for possession because he has not taken the steps which are necessary for him to take as raiyat to eject the under-raiyat.

For these reasons I think the decree of the first appellate Court should be set aside and a decree made in favour of the plaintiff in the terms I have indicated.

The plaintiff will have the costs of this appeal and the appeal before Mr. Justice Walmsley, but each party will bear their own costs in the two lower Courts.

Of course, this judgment is as regards plot No. 3 only, and we do not interfere with any of the decrees as regards the other plots.

**Mookerjee J.**—I agree.

A. N. R. C.

*Appeal allowed.*

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.*

GAJADHAR PRASAD

v.

MUSSAMAT LOHIA *alias* LABHIA AND OTHERS. \*

*Appeal—Civil Procedure Code (Act V of 1908), O. 41 r. 27—Additional evidence, produced after arguments heard—Admission of such evidence by the appellate Court, if proper—Reasons not recorded for admission of the evidence, effect of.*

An appellate Court ought not to admit in evidence documents produced by a party after the appeal has been heard, arguments have been addressed, and

\* Letters Patent Appeal, No. 115 of 1915, against the decision of Mr. Justice Walmsley, dated the 2nd July, 1915, in appeal from Appellate Decree, No. 3854 of 1913, against the decree of Babu Gaya Prosad Pandey, Subordinate Judge at Shahabad, dated the 23rd August, 1913, reversing that of Mr. S. K. Rahaman, Munsiff of Buxar, dated the 29th April, 1912.

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judgment has been reserved, inasmuch as the other party thereby gets no opportunity of rebutting the evidence contained in the documents, and his pleader also has no opportunity of arguing the effect of them.

The judgment of the appellate Court is also to be set aside where no reason has been accorded for the admission of the additional evidence as required by order 41 rule 27 of the Code of Civil Procedure.

Appeal by the plaintiff.

Suit for a declaration that the plaintiff was by custom entitled to half the fruits of a certain jack tree which was upon his estate but within the homestead of the defendant, a tenant of the plaintiff, and for recovery of four annas, the estimated value of fruits removed by the defendant.

*Babus Provas Chandra Mitter, Roy Gurusaran Prashad and Ambica Prosad Upadhaya* for the Appellant.

*Babus Umakali Mukherjee and Satis Chandra Mukherjee* for the Respondents.

C. A. V.

The following judgment was delivered by

**Walmsley J.**—The plaintiff appellant brought his suit for a declaration that a certain jack tree is in the plaintiff's *taktha* and in the defendant's courtyard, and that the defendant possesses the tree subject to the obligation of delivering to the plaintiff half its fruit or the value thereof; and he also asked for four annas the estimated value of a fruit said to have been removed by the defendant.

The learned Munsiff decreed the suit, but on appeal the learned Subordinate Judge held that the plaintiff failed to prove a custom by which the fruit borne by the tree was divided between landlord and tenant and he dismissed the suit.

In this Court it has been urged in the first place that the lower Court admitted additional evidence in violation of the provisions of order XLI, Rule 27. The evidence referred to is a "village note." But all that the learned Subordinate Judge says of the paper is "on the latter point he (the defendant) has also filed copy of village note." There is no reason to suppose that the Judge's decision was influenced by the village note, any more than these colourless words suggest. In fact the following paragraph of his judgment shows that his decision rested on other evidence. That being so, it is idle to discuss the propriety of allowing the village note to be received in evidence during the appeal.

Next it is contended that although the judgment is one reversing the decision of the first Court, the lower appellate Court has disregarded the Record of Rights and has laid the onus on the plaintiff. This contention is rather an unfortunate one, for the *khatian* has

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this remark in column 7 "one jack fruit tree entirely belonging to the tenant;" opposite another plot in the possession of a different tenant there is a remark to the effect that the landlord has a half share, but regarding the defendant the entry is as I have mentioned. The record of rights is therefore against the plaintiff. Reference is made to a *purcha*, but it is to the *khatian* that the Court must look. It follows that the onus was on the plaintiff, both to prove the custom which he set up and to rebut the presumption arising under section 103 B of the Tenancy Act.

Lastly it is said that the plaintiff's title ought to have been declared. In the plaint however he asked for a declaration of the tenant's obligation to make over half the produce as an integral part of his prayer. The existence of the tree has never been denied, there is an admission that it stands within plaintiff's *takhta*, and further, the result of this suit will not affect the plaintiff's right under section 23 of the Tenancy Act. It is therefore unnecessary to modify the lower appellate Court's decree. The appeal is dismissed with costs.

Against this decision the plaintiff preferred an appeal under section 15 of the Letters Patent.

*Babu Biraj Mohan Mojumdar* (with him *Babu Monmatha Nath Mukherjee*) for the Appellant.

*Babu Satis Chandra Mukherjee* for the Respondent.

The following judgments were delivered :

**Sanderson C. J.**—In this case the suit was brought by the plaintiff alleging that by custom the plaintiff was entitled to half the fruits of a certain tree which was upon his estate, but within the homestead of the defendant who was a tenant of the plaintiff. The custom was alleged to exist with regard to this tree, inasmuch as it was upon land in respect of which the tenant paid no money rent but had to give half its fruits ; and, it was alleged that the landlord was entitled to receive half the fruits of this particular tree.

We are told that this is a test case which may govern other cases than the one now in question.

The Munsiff, who tried the case in the first Court, decided in favour of the plaintiff, and held, as I read his judgment, that there was the custom.

Then the appeal went to the learned Subordinate Judge in the first appellate Court, and it seems that on the 21st of August the appeal was heard and arguments addressed to the learned Judge : and after that he reserved judgment. Then having reserved judgment, as I understand, at a subsequent stage, in the absence of the plaintiff—although the plaintiff's pleader was there—the learned Judge

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allowed the defendant's pleader to put in certain documents, inspite of the protest of the plaintiff's pleader. Those documents were described by the learned Judge as "certain papers along with lists:" and, it appears from a subsequent note that those papers included "certified copy of the survey village note" which was marked Exhibit B under the direction of the learned Judge: but the learned Judge has not recorded any reason for admitting that evidence. On the other hand, the plaintiff has alleged that if the evidence was to be admitted at all, he ought to have been given an opportunity of rebutting that evidence; and the importance of that argument is made clear by the judgment of the learned Judge himself, because in giving his judgment, after referring to the village note which was put in on behalf of the defendant, he goes on to say when dealing with the plaintiff's evidence, "The plaintiff has in my opinion failed to prove that the defendant ever divided the fruits with the plaintiff or his predecessor in title. It is admitted by the plaintiff's witness that the previous owner made over to him the village papers. These would have been the best evidence to show the division of the fruits but they have been withheld." It is stated in the plaintiff's affidavit that if the plaintiff had been given an opportunity of rebutting the evidence contained in the notes which were put in on behalf of the defendant, he would have been able to put in those papers—whether they would assist his case or not I cannot tell. Personally I think, quite apart from the rules of the Code, to which I intend to make reference directly, that is not the way in which an appeal ought to be heard. I do not think it was fair to the plaintiffs that these notes should have been admitted by the learned Judge after the arguments were finished, when apparently the plaintiff's pleader had no opportunity of arguing the effect of them, certainly the plaintiff had no opportunity of rebutting the evidence contained in those papers.

But the case may be looked at from a different point of view. That is the point of view under the rules of the Civil Procedure Code, the material one being order XLI rule 27, which runs as follows: "The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if \* \* \* the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined. Wherever additional evidence is allowed to be produced by an appellate Court, the Court shall record the reason for its admission." In this case the learned Judge has not recorded any reason for the

admission of the evidence, and I think myself that that alone would be sufficient for us to allow this appeal. I do not wish to rest my judgment upon that alone, because I think the merits of the case are in favour of the plaintiff. The learned Judge of the High Court, Mr. Justice Walmsley, in giving his judgment seems to have been satisfied that the learned Subordinate Judge was not influenced by the evidence contained in the papers which were put in on behalf of the defendant after the case had been argued and judgment was reserved. With greatest respect to him, I think that is not a legitimate conclusion to arrive at : because, if we look at Exhibit B, there is a material statement in it—a statement which has been marked with red pencil and we cannot help noting that, that must have been marked by him because it was in his opinion a material piece of evidence in the case. How much it may have affected his mind, we are unable to say ; but, in my opinion, it is impossible for us to say that it did not affect his mind at all. Therefore, on the ground, *first* of all, that the learned Judge has not recorded his reason for admitting the evidence ; and *secondly* on the ground that the evidence ought not to have been admitted in the circumstances, after the case was argued, and *thirdly* on the ground that we cannot say that the evidence did not affect his mind, I think this appeal ought to be allowed.

Then the question arises what course ought to be adopted. In my judgment, the case should go back to the first appellate Court for the purposes of being reheard : and, we give direction that if the learned Judge who hears the case thinks it right to hear further evidence under the circumstances of this case, then of course it will be in his discretion to allow it ; but if he does allow it, he must give an opportunity to both parties to produce such evidence as they think fit. Further, I think that we ought to say that this case ought not to be tried by the same Subordinate Judge who has already heard it. I do not wish to make any reflection on the Subordinate Judge, in any shape or form : but I think it may be difficult for him, when he hears the case on the second occasion, to have an impartial mind free from his former impressions. Therefore, I think the case should go back to the District Judge, so that if he does not hear it himself, he will direct it to be tried by another Subordinate Judge competent to try it.

This plaintiff will have the costs of this appeal, the appeal before Mr. Justice Walmsley and in the first appellate Court.

**Mookerjee J.**—I agree.

\*, N. R. C.

*Appeal allowed, case remanded.*

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*Before Sir Asutosh Mookerjee, Knight, Judge, and  
Mr. Justice Beachcroft.*

JOGENDRA PROSAD MITRA AND OTHERS

v.

ASUTOSH GOSWAMI AND OTHERS.\*

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*Decree, execution of—Limitation Act (IX of 1908) Sch. I. Art. 182—Step in aid of execution—Leave to bid—Acceptance of portion of decretal amount from several judgment-debtors, effect of—Uncertified payment—Execution Court, if can investigate fact of payment.*

An application was made by a decree-holder for leave to bid at the sale which had been advertised. In this application, which was granted by the Court, it was stated that when the properties would be put up for sale, it would be necessary for the decree-holder to make a purchase for the decretal amount, if no other purchaser offered any bid, and it was prayed that permission might be granted in that behalf :

*Held*, that the application was not an application to the proper Court to take a step in aid of execution of decree.

*Bansi v. Sikree Mal* (1) ; *Dalal v. Umrao* (2) and *Vinayakrao v. Vinyak* (3) dissented from.

*Toree Mahomed v. Mahomed* (4) and *Raghunandan v. Kallydutt* (5) followed.

Where the decree-holder accepted sums tendered by the different judgment-debtors from time to time and undertook not to proceed with execution against those judgment-debtors, but did not release them from liability under the decree :

*Held*, that the decree could be executed against all the judgment-debtors.

*Ramratan v. Aswini* (6) distinguished.

It is not open to an execution Court to investigate the fact of receipt of decretal amount by the decree-holder which was not certified to the Court by the judgment-debtor within the prescribed time.

*Gadadhar v. Shyam* (7) not followed.

Appeal by the Judgment-debtors.

Application for execution of decree.

The material facts and arguments appear from the judgment.

*Babus Biraj Mohan Mojumdar* and *Hari Bhusan Mookerjee* for the Appellants.

*Babus Sib Chandra Palit* and *Hira Lal Sanyal* for the Respondents.

\* Appeal from Order No. 92 of 1911, against an order of Babu Radha Nath Sen, Subordinate Judge of Jessore, dated the 5th August, 1909.

(1) (1890) I. L. R. 13 All. 211.

(3) (1895) I. L. R. 21 Bom. 331.

(5) (1896) I. L. R. 23 Calc. 690.

(7) (1908) 12 C. W. N. 485.

(2) (1900) I. L. R. 22 All. 399.

(4) (1883) I. L. R. 9 Calc. 730.

(6) (1910) I. L. R. 37 Calc. 559.

The judgment of the Court was delivered by

**Mookerjee J.**—This is an appeal by five of the judgment-debtors against an order for execution of a decree for mesne profits, made on the 11th December 1899. There were applications for execution in 1901 and 1903 to which no detailed reference is necessary for the purposes of this appeal. These were followed by a third application for execution on the 22nd August 1905. The present application was not made till the 6th January 1909, and is *prima facie* barred by limitation. The decree-holders endeavour, however, to take the case out of the bar of limitation by reliance upon section 19 and art. 182 of the first schedule of the Indian Limitation Act.

In so far as the first ground is concerned, it is contended that on the 19th February 1906 there was an acknowledgment by the appellants sufficient for the purpose of section 19. On that date, an application was presented to the Court for adjournment of the sale. The application on the face of it purports to have been made on behalf of one of the appellants Jogendra Prosad Mitter. It has been argued, however, that the application was in reality made by him on behalf of the other judgment-debtors as well. Before we deal with this question, it is necessary to point out that the application is not explicitly on behalf of all the judgment-debtors. An examination of the original application shows that an attempt has been made to tamper with it. In the right hand corner, there appears the signature of Jogendra Prosad Mitter. He is consequently the applicant and the application purports to have been made on his behalf by his pleader Amritlal Mitter. In the body of the petition, it was originally stated that the application was on behalf of Jogendra Prosad Mitter, but an alteration has been effected, which on the face of it looks like a subsequent interpolation. This is obvious from an examination of the two paragraphs which constitute the body of the petition. In the first paragraph, it is stated explicitly that there was a prayer for one month to be granted to the petitioner. The word used is *amake* (আমাকে) in the singular. In the second paragraph also, it is clear that in the petition as originally drawn up, there was a statement that 'I,' that is the petitioner, will not take any objection to the validity of the sale which might be held. An attempt, however, has been made to alter the word 'আমি' into 'আমরা'. In these circumstances the petition must be taken to have been made by Jogendra Prosad Mitter alone. Hence, arises the question whether the application, if it be construed to embody an acknowledgment, avails against the other defendants. That the application

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does embody an acknowledgment is clear because the petitioner states that in case of his failure to pay up the decretal money on the date to be fixed for sale in the month following, he will not be able to take any objection to the validity of the sale. This implies and acknowledges an obligation to pay the decretal debt. In order to make this acknowledgment operative against the co-judgment-debtors of Jogendra Prosad Mitter, the requirements of section 19 must be fulfilled. Section 19 requires that the acknowledgment of liability be made in writing, signed by the party against whom the right is claimed or by some person through whom he derives title or liability. The second explanation to the section then states that the term 'signed' means signed either personally or by an agent duly authorised in this behalf. The application was, as already stated, signed by Jogendra Prosad Mitter alone and by his pleader Amrita Lal Mitter on his behalf. It has been contended on behalf of the respondents decree-holders that this signature may be taken to have been made by an agent of the other judgment-debtors. But there is no proof that Jogendra Prosad Mitter was authorised duly to make this acknowledgment on behalf of his co-judgment-debtors. It is clear, therefore, that the decree-holders have failed to establish that there has been a valid acknowledgment under sub-section (1) of section 19 of the Indian Limitation Act as against the four judgment-debtors other than Jogendra Prosad Mitter. The acknowledgment is of no avail against them.

In so far as the second ground is concerned, it has been argued that within three years antecedent to the application of the 16th January 1909, the decree-holders had applied to the proper Court to take a step in aid of execution of the decree. Reliance is placed, in this connection, upon an application made by the decree-holders on the 19th February 1906 for leave to bid at the sale which had then been advertised. In this application, which was granted by the Court, it was stated that when the properties would be put up for sale, it would be necessary for the decree-holders to make a purchase for the decretal amount, if no other purchaser offered any bid, and, it was prayed that permission might be granted in that behalf. For the decree-holders, it has been argued that this application was an application to the proper Court to take a step in aid of execution of the decree, and reliance has been placed in support of this view upon the cases of *Bansi v. Sikree Mal* (1); *Dalal Singh v. Umrao Singh* (2), and *Vinayakrao*

(1) (1890) I. L. R. 13 All. 211.

(2) (1900) I. L. R. 22 All. 399.

*Gopal v. Vinayak Krishna* (1). These cases, it may be conceded, do support the contention of the decree-holders. But it has not been disputed that a contrary rule was laid down by this Court in the cases of *Toree Mahomed v. Mahomed* (2); *Raghunandan v. Kallydutt* (3). On behalf of the decree-holders, the view taken in the case last mentioned has been criticised and we have been invited to refer the question for decision to a Full Bench. Our attention has also been drawn to the dictum of Mr. Justice Banerjee in *Troyloky v. Jyotiprakash* (4), and reference has been made to the judgment of one member of this Bench in *Hiralal v. Dwija* (5). We may say at once that we are not prepared to accept the view expounded in *Bansi v. Sikree* (6); *Dalal v. Umrao* (7); and *Vinayakrao v. Vinayak* (1). For our present purposes, it is also unnecessary to determine whether, in any conceivable circumstances, an application for leave to bid may be deemed an application to the proper Court to take a step in aid of execution, because even if it be assumed that there may be cases in which an application for leave to bid may be an application to the proper Court to take a step in aid of execution, such circumstances undoubtedly do not exist in the case before us. It has been established that on the very day when the application for leave to bid was granted, the decree-holders consented to an adjournment of the sale, and on the date when the property was subsequently put up for sale, although there were no bidders present, the decree-holders themselves did not avail themselves of the opportunity granted to them to offer bids. Under these circumstances, it is impossible to hold that the application of the 19th February 1906 was in any sense an application to the proper Court to take a step in aid of execution. The conduct of the decree-holders shows that not only was execution not ended, it was rather retarded by them. The two grounds assigned to support the contention that the application for execution dated the 6th January 1909, is not barred by limitation, both prove unsustainable in so far as the judgment-debtors other than Jogendra Prosad Mitter is concerned. As regards him, however, there was clearly a valid acknowledgment within the meaning of section 19 of the Indian Limitation Act. We must consequently hold that the application is barred by limitation as regards the four judgment-debtors other than Jogendra Prosad Mitter.

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(1) (1895) I. L. R. 21 Bom. 331.

(2) (1883) I. L. R. 9 Calc. 730.

(3) (1896) I. L. R. 23 Calc. 690.

(4) (1903) I. L. R. 30 Calc. 761 (769).

(5) (1905) 3 C. L. J. 240.

(6) (1890) I. L. R. 13 All. 211.

(7) (1900) I. L. R. 22 All. 399.

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On behalf of Jogendra Prosad Mitter, it has been finally contended that the appeal should succeed on two other grounds. It has been argued, in the first place, that the decree-holders were disentitled in view of their own conduct, to execute the decree against him for recovery of the balance thereof. It has been stated that on a previous occasion the decree-holders accepted from some of the judgment-debtors, moneys alleged to represent their rateable share of the entire judgment-debt. On this basis, it has been contended, that the judgment-debt was by the conduct of the decree-holders split up and the decree-holders can pursue their remedy against each judgment-debtor only to the extent of his separated liability. In our opinion, there is no foundation for this contention. The decree-holders, no doubt, accepted sums tendered by the different judgment-debtors from time to time. They also undertook not to proceed with execution against those judgment-debtors ; but at the same time, they did not release them from liability under the decree. On the other hand, it was expressly stated that if upon execution of the decree against the other judgment-debtors, the whole of the judgment-debt was not realised, the decree-holders, would be at liberty to proceed with execution for recovery of the balance even as against those who had made the payments mentioned. Consequently, the principle recognised in the case of *Ramratan v. Aswini* (1), cannot be applied to the circumstances of this case.

The next ground upon which it has been urged that execution should not be allowed to proceed against Jogendra Prosad Mitter is that he had from time to time made payments towards satisfaction of the decree for which no credit had been allowed by the decree-holders. But these payments were not duly certified as required by rule 2 of order XXI of the Code, and the time within which the judgment-debtor could have invited the Court to have the payments recorded, has elapsed. It is thus no longer open to the execution Court to take notice of the alleged payments. Reliance, however, has been placed upon the case of *Gadadhar v. Shyam Churn* (2), in support of the proposition that as this omission on the part of the decree-holders to allow credit for the payments made was an act of fraud, it is open to the Court to investigate the question of fraud under section 47 of the Code. In our opinion, there is no foundation for this contention : If this argument were to prevail, the restriction imposed by the Legislature upon the execution Court under rule 2 of order XXI of

(1) (1910) I. L. R. 37 Calc. 559.

(2) (1908) 12 C. W. N. 485.

the Code would be nullified. It is worthy of note that the view taken in the case of *Gadadhar v. Shyam* (1) which accords with that adopted in *Ramayyar v. Ramayyar* (2), has been repudiated. *Ganapathy v. Chenga* (3); *Veerappa v. Ponnayya* (4); *Kamini v. Aghore Nath* (5); *Nistarini v. Kazim Ali* (6); *Monmohan v. Dwarkanath* (7); *Hiranmoy v. Musa Khan* (8); *Biroo v. Jainwati* (9). As it is not competent to the execution Court to allow credit for uncertified payments, it is not necessary for us to investigate, whether the alleged payments were actually made.

The result is that this appeal is allowed, in so far as the appellants other than Jogendra Prosad Mitter is concerned, and any sums belonging to them, which may have been taken away by the decree-holders under the order of the Court below, must be refunded at once. In so far as Jogendra Prosad Mitter is concerned, the appeal will stand dismissed. The decree-holders respondents must pay the successful appellants their costs both here and in the Court below; but they will be entitled to receive from Jogendra Prosad Mitter their costs in both the Courts. We assess the hearing fee in this Court at five gold mohurs.

A. T. M.

*Appeal allowed.*

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|----------------------------------------------|----------------------------------|
| (1) (1908, 12 C. W. N. 485.                  | (2) (1897) I. L. R. 21 Mad. 356. |
| (3) (1905) I. L. R. 29 Mad. 312.             | (4) (1907) 17 M. L. J. 527.      |
| (5) (1909) 11 C. L. J. 91.                   | (6) (1910) 12 C. L. J. 65.       |
| (7) (1910) 12 C. L. J. 312 (317).            | (8) (1910) 16 C. L. J. 169.      |
| (9) (1911) 16 C. L. J. 174; 16 C. W. N. 923. |                                  |

*Before Sir Asutosh Mookerjee, Knight, Judge, and  
Mr. Justice Cuming.*

ASHUTOSH GOSWAMI AND OTHERS

v.

UPENDRA PROSAD MITRA AND ANOTHER.\*

*Restitution—Dependent judgment or order—Restitution, when to be had—  
Limitation—Interest.*

\* Appeal from Original Decree No. 62 of 1915, against the decision of Babu Debendra Nath Pal, Subordinate Judge of Jessore, dated the 22nd August, 1914.

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It is a general rule that upon the reversal of a judgment, order or decree, all connected or dependent judgments or orders fall with it, specially judgments subsequently entered and dependent thereupon ; but this rule does not operate by implication to set aside a distinct and independent judgment or proceeding though it forms a part of the same litigation.

Whether a judgment or order is a dependent judgment or order, that is, is merely ancillary and accessory to another judgment so as to have its fate and fall to the ground along with it, is to be determined from the nature and scope of the proceedings.

In cases not comprehended strictly within the letter of section 144 of the Civil Procedure Code (which makes grant of restitution obligatory in certain circumstances) restitution is not a matter of right but depends upon the sound discretion of the Court and will be ordered only when the justice of the case calls for it ; but the test of what is just, must be determined with reference to the imperative requirements of the law applicable to the subject matter.

An obligation is imposed upon the Court to dismiss an application for execution of a decree, if the application is barred by limitation. Hence the Court cannot withhold relief by way of restitution, when a sum has been paid out on the strength of an erroneous decision upon a point of limitation.

The Court will not permit an injustice to be done by reason of an erroneous order made by it and will, when that erroneous order has been reversed, restore the parties to the position which they would otherwise have occupied.

When a person receives money under a decree which is afterwards reversed on appeal, the statute of limitation commences to run in his favour only from the reversal.

*Dino Nath v. Jogendra Nath* (1) doubted.

When a decree-holder withdraws money under a decree which is afterwards reversed on appeal, he is bound to restore the amount with interest at the rate of 6 per cent. per annum from the date of withdrawal to the date of repayment into Court.

*Rodger v. Comptoir* (2) ; *Merchant Banking Co. v. Maud* (3) ; *Imperial Mercantile Credit Association v. Coleman* (4) and *Forester v. Secretary of State* (5) referred to.

Appeal by the Decree-holder.

Application for restitution of money under decree.

The material facts and arguments appear from the judgment.

*Sir S. P. Sinha* and *Babu Hira Lal Sanyal* for the Appellants.

*Dr. Sarat Chunder Bysak*, *Babus Gunada Charan Sen* and *Bepin Chunder Bose* for the Respondents.

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(1) (1914) 19 C. W. N. 1167.

(2) (1871) L. R. 3 P. C. 465.

(3) (1875) L. R. 18 Eq. 659.

(4) (1871) L. R. 6 Ch. App. 558.

(5) (1877) L. R. 4. I. A. 137 ; I. L. R. 3 Calc. 161.

The judgment of the Court was delivered by

**Mookerjee J.**—This appeal is directed against an order for restitution. The facts material for the determination of the questions in controversy are not in dispute and may be briefly set out. On the 11th December, 1899, the appellants, members of a family of Goswamis, obtained a decree for money against a large number of defendants, members of a family of Mitras. Execution was taken out from time to time, but practically to no purpose. On the 6th January, 1909 an application for execution was made, more than 3 years after the date of the previous application. Objection was thereupon taken on the 3rd February 1909 by the judgment-debtors that the application was barred by limitation. This objection was registered and numbered as a separate proceeding, and was overruled on the 5th August, 1909. Five of the judgment-debtors then appealed to this Court on the 10th May 1910. The appeal was decreed on the 9th January 1914 as regards four of the appellants and was dismissed as regards the other. This Court held that the bar of limitation was available to the judgment-debtors except to the one who had made an acknowledgment within the meaning of section 19 of the Limitation Act, and proceeded to give a direction in the decree for restitution in the following terms: "The result is that this appeal is allowed in so far as the appellants other than Jogendra Prosad Mitter is concerned, and any sums belonging to them which may have been taken away by the decree-holders under the order of the Court below must be refunded at once." To make this order intelligible, it is necessary to state what had happened in the Court below in the interval. On the 5th July 1909, while the application for execution made on the 6th January, 1909 was still under consideration, the decree-holders made a fresh application for execution, with a view to attach funds in Court which stood to the credit of two of the judgment-debtors. The decree-holders desired that this application should be consolidated with the previous application which was for execution by attachment and sale of movables owned by the judgment-debtors. The judgment-debtors objected to the amalgamation of the two applications, and on the authority of the decision in *Ahmed Chaudhuri v. Shahzada Khatoon* (1) the Court directed the subsequent application to be registered and numbered as a separate proceeding. There were thus three proceedings on the records of the Court, namely, the two applications for execution made on the 6th January and 5th July, 1909, respectively, and the objection case initiated on the

(1) (1880) 7 C. L. R. 537.

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3rd February 1909. The objection case raised a question which went to the root of both the applications for execution, because if the objection prevailed, no relief could be granted to the decree-holders on the basis of either application. This was evidently in view when the Court directed, on the 31st July and 2nd August, 1909, that the second application was to be put up along with the first application and the objection case. The objection case, as we have seen, was dismissed on the 5th August, 1909. On that date we find it recorded, in the order sheet of the case on the second application, that as the objection had been disallowed after contest, the decree-holders were to take steps. The decree-holders thereupon applied for payment of the fund in deposit in Court to the credit of two of the judgment-debtors. There was an *ad interim* stay of proceedings under the orders of the District Judge passed at the instance of the judgment-debtors; but the stay order was ultimately withdrawn on the 25th September, 1909, as the judgment-debtors had failed to show that the circumstances of the decree-holders were such that there would be any difficulty in obtaining restitution, should the judgment-debtors ultimately succeed in their appeal in the objection case. Here it may be observed parenthetically that the judgment-debtors had lodged an appeal before the District Judge against the order in the objection case; it ultimately transpired, however, that the appeal lay to the High Court, because the decree, though for a smaller sum than Rs. 5,000, had been made in a suit valued at above Rs. 5,000; it was for this reason that the appeal in the objection case was not lodged in this Court till the 10th May, 1910. To return to the narrative of events in the Court below: we find that after the stay order had been withdrawn by the District Judge on the 25th September 1909, the Subordinate Judge, on that very day, directed payment to the decree-holders of the fund in Court. No appeal was preferred against the payment order; none, indeed, could have been profitably preferred, for payment could be resisted only if the decree was barred by limitation, and that was the very point involved in the appeal against the order in the objection case. After the appeal in the objection case had been decreed in this Court, the two judgment-debtors, whose deposit had been taken away by the decree-holders, applied to the Court below [for restitution on the 30th May, 1914. The decree-holders objected substantially on six grounds, namely, *first*, that the sum in question was not covered by the direction for restitution made by this Court in the appeal against the order in the objection-case; *secondly*, that restitution should not be granted, as no appeal had been preferred

against the payment order, and what had been reversed by this Court was not the payment order but the determination in the objection case that the decree was not barred by limitation ; *thirdly*, that as the effect of section 28 of the Limitation Act was merely to bar the remedy and not to extinguish the right, no order for restitution could justly be made ; *fourthly*, that the application for restitution was barred by limitation ; *fifthly*, that the fund, though it stood in the name of two of the judgment-debtors, was not their exclusive property, and belonged, partly at least, if not entirely, to Jogendra Prosad Mitra, against whom the application for execution was not barred by limitation ; and, *sixthly*, that the claim for interest was unjust and excessive. The Subordinate Judge held that the sum claimed by way of restitution was covered by the order made by this Court, and, accordingly, directed the decree-holders to refund the sum withdrawn by them together with interest at 12 per cent. per annum and costs. We are now invited by the decree-holders to consider the propriety of this order.

The first point for consideration is, whether the sum withdrawn by the decree-holders is covered by the direction given by this Court in the appeal in the objection case. We are of opinion that the direction, strictly construed, does not cover the money in controversy. The decretal order drawn up in this Court removes any ambiguity which may be supposed to be involved in the judgment ; the decree directs explicitly that the order of the Court below, dated the 5th August, 1909, directing execution to proceed be and is set aside, and, further orders that the respondents decree-holders do refund to the appellants other than Jogendra Prosad Mitra, (whose appeal was dismissed), any sums belonging to them which might have been taken away under the said order of the Court below. The decree-holders argue that this refers in terms to sums, if any, taken away by them under the order of the 5th August, 1909, and that the sum now in question cannot, by any stretch of language, be deemed to have been taken away by them under that order. This is a reasonable contention ; the only proceeding then before this Court was the objection case, and it would not be right to put an extended interpretation upon our order, so as to prejudice the decree-holders, without opportunity afforded to them to show cause why restitution should not be granted in respect of sums taken away by them in a proceeding which was, in form at least, never brought up to this Court. We hold accordingly that the direction previously given by this Court does not conclude the matter which must, consequently, be determined on the merits.

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The second point for consideration is, whether restitution may be claimed by the judgment-debtors, although they did not appeal against the payment order. The decree-holders contend in substance that restitution should not be granted, as the payment order has never been formally reversed on appeal. We are of opinion that there is no substance in this technical objection. It is a general rule that upon the reversal of a judgment, order or decree, all connected or dependent judgments or orders fall with it, specially judgments subsequently entered and dependent thereupon; but this rule does not operate by implication to set aside a distinct and independent judgment or proceeding, though it form a part of the same litigation. Illustrations of the application of this doctrine may be found in a variety of cases in the reports: *Chicago Ry. Co. v. Fosdick* (1); *Butler v. Eaton* (2). Whether a judgment or order is a dependent judgment or order, that is, is merely ancillary and accessory to another judgment so as to share its fate and fall to the ground along with it, must be determined from the nature and scope of the proceedings, and may, as some of the cases in the books show, give rise to questions of considerable nicety and consequent divergence of judicial opinion: *Shamapurshad v. Hurropurshad* (3); *Jogeschandra v. Kali Churn* (4). In the case before us, the payment order was manifestly dependent upon the decision that the decree was not barred by limitation and was consequential thereupon. This is indicated by the substance as well as the form of the proceeding. No payment order could be made till it had been decided that the decree was still alive and capable of execution. This was expressly recognised when, on the 2nd August, 1909, the application for execution, by way of attachment of the deposit, was ordered to be put up after the disposal of the objection case, as also when, on the 5th August, 1909, the decree-holders were directed to take steps as objection had been disallowed after contest. That this was the true position was also clearly understood by the parties, when, on the 25th September 1909, the decree-holders induced the District Judge to revoke the stay order on the ground that there would be no difficulty in the way of restitution, if the appeal already preferred in the objection case ultimately proved successful. In these circumstances, we may legitimately hold that the payment order was in essence ancillary to the decision in the objection case, and that the cancellation of the order in the objection case by this Court as the Court of appeal involved by necessary implication a

(1) (1882) 106 U. S. 47.

(2) (1890) 141 U. S. 240.

(3) (1865) 10 M. I. A. 203.

(4) (1877) I. L. R. 3 Calc. 30.

cancellation of the consequential payment order. In this view, the judgment-debtors are entitled to restitution, even though they did not formally appeal against the payment order.

The third point for consideration is, whether the judgment-debtors are entitled in justice, equity and good conscience to invoke the inherent power of the Court to grant them relief by way of restitution, when it is borne in mind that they have obtained a reversal of the order for execution solely on the ground of limitation. The argument of the decree-holders in substance is that, inasmuch as, under section 28 of the Limitation Act, their remedy alone has been barred though their right as execution-creditors has not been extinguished [*Gajadhar v. Raghubar* (1)], they should be allowed to retain the money which they may have received under an erroneous order of the Court. Now, it may be conceded that, in cases not comprehended strictly within the letter of section 144 of the Civil Procedure Code (which makes grant of restitution obligatory in certain circumstances), restitution is not a matter of right but depends upon the sound discretion of the Court and will be ordered only when the justice of the case calls for it ; but the test of what is just must be determined with reference to the imperative requirements of the law applicable to the subject matter. Section 3 of the Limitation Act requires that every application made after the period prescribed therefor by the first schedule *shall* be dismissed, although limitation has not been set up as a defence. An obligation is thus imposed upon the Court to dismiss an application for execution of a decree, if the application is barred by limitation : *Mohomed Hossein v. Purundur* (2) ; *Ramu Rai v. Dayal Singh* (3). We are not concerned with the policy of the Legislature as indicated by section 3 ; the essential point is that the provision is mandatory, as explained by the Full Bench in *Balaram v. Mangta Das* (4). It would consequently not be right for the Court to withhold relief by way of restitution,\* when the sum has been paid out on the strength of an erroneous decision upon a point of limitation. The principle on which restitution is granted accordingly applies quite as much to this case as to any other ; that principle is lucidly stated by Lord Cairns in the decision of the Judicial Committee in *Rodger v. Comptoir D'Escompte de Paris* (5) : "One of the first and highest duties of all Courts is to take

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(1) (1907) 12 C. W. N. 60.

(2) (1885) I. L. R. 11 Cal. 287.

(3) (1894) I. L. R. 16 All. 390.

(4) (1907) 6 C. L. J. 237 ; I. L. R. 34 Cal. 941.

(5) (1871) L. R. 3 P. C. 465 (475) ; 7 Moo. P. C. N. S. 314.

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care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter upto the highest Court which finally disposes of the case; it is the duty of the aggregate of those tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court." The term "injury" is here used, not in a popular but in a legal sense, that is, an infraction of a juridical right. The principle that the Court will not permit an injustice to be done by reason of an erroneous order made by it and will, when that erroneous order has been reversed, restore the parties to the position which they would otherwise have occupied, is of a fundamental character and has been applied in a variety of instances in England, in the United States and in this country. Reference may be made to *Eyre v. Woodfine* (1); *Western v. Creswick* (2); *R. v. Leaver* (3); *U. S. Bank v. Washington Bank* (4); *Ex Parte Morris* (5); *N. W. Fuel Co. v. Brock* (6); *Beni Madho v. Pran Singh* (7); *Raghu Singh v. Shew Prosad* (8). We are not unmindful that in *Safaraddi v. Durga Prosad* (9) a narrower test was suggested for determination of the right of a claimant for restitution, namely, whether he could have obtained the same relief by the institution of a suit, which, be it noticed, is not permissible under section 144 (2) in cases covered by section 144 (1) of the Civil Procedure Code: *Mullaseri v. Krishekai* (10). It is sufficient to observe that broader view of the principle whereon restitution is based was taken by the Judicial Committee in the case mentioned. It may also be observed that the decision in *Safaraddi v. Durga Prosad* (9) is founded on a view of the relative rights of a landlord and a transferee of a portion of a non-transferable occupancy holding, which has subsequently been negatived by the Full Bench in *Dayamayi v. Ananda* (11). We also find that notwithstanding the decision in *Safaraddi v. Durga Prosad* (9) the rule formulated in *Beni Madho v. Pran Singh* (7) was followed in *Amirannessa v.*

(1) (1589) Cro. Eliz. 278.

(2) (1690) 4 Mod. 161; 3 Salk. 214.

(3) (1692) 2 Salk. 588.

(4) (1832) 6 Peter 8.

(5) (1869) 9 Wallace 605.

(6) (1890) 139 U. S. 216.

(7) (1911) 15 C. L. J. 187.

(8) (1912) 16 C. L. J. 135.

(9) (1912) 16 C. L. J. 83.

(10) (1911) 22 M. L. J. 146.

(11) (1914) 20 C. L. J. 52; I. L. R. 42 Calc. 172; 18 C. W. N. 971.

*Kurimannessa* (1). We hold accordingly that the judgment-debtors are not precluded from claiming restitution merely because they have succeeded on the ground of limitation.

The fourth point for consideration is, whether the bar of limitation is applicable to the application by the judgment-debtors for restitution. It is difficult to appreciate how a question of limitation can possibly arise in the present proceedings. The order of this Court in appeal was made on the 9th January, 1914; the payment order must be deemed to have been in full operation up to that date and was superseded only then. The judgment-debtors applied for restitution on the 21st May, 1914. The only article of the Limitation Act which may possibly apply, if any rule of limitation is at all deemed applicable, is article 181, which provides that all applications for which no period of limitation is provided elsewhere in the schedule must be made within 3 years from the date when the right to apply accrues † *Haris Chandra v. Chandra Mohan* (2); *Ricketts v. Rameswar* (3); *Nand Ram v. Sita Ram* (4); *Kurupam v. Sadasiva* (5). We are not unmindful that a different rule is possibly involved in the decision of this Court in *Dinanath v. Jogendranath* (6). In that case, the decree-holder purchased the property of the judgment-debtor in execution of his decree in 1900 and took possession of the property sold in November, 1900. Proceedings were thereupon instituted by the judgment-debtor to have the sale set aside. The order for cancellation of the sale was not made till the 29th June, 1907 and the property was not restored to the judgment-debtor till June 1908. On the 2nd April, 1910, the representative of the judgment-debtor applied to the Court for an order upon the decree-holder auction-purchaser to make restitution of the profits received by him during the time that he was in possession. This Court held that the applicant was entitled to profits only for a period of three years antecedent to the date of application, and, accordingly, made an order for restitution of the profits realised between the 2nd April, 1907 and June 1908. Reference was made to the decision in *Safaraddi v. Durga* (7) and it was assumed that as article 109 applies the three years' rule to a suit for *mesne profits*, the applicant was restricted to his remedy by way of restitution for a similar period. This view is clearly inconsistent with the long series of decisions we have mentioned,

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(1) (1914) 18 C. W. N. 1299.

(2) (1900) I. L. R. 28 Calc. 113.

(3) (1900) I. L. R. 28 Calc. 109.

(4) (1886) I. L. R. 8 All. 545.

(5) (1886) I. L. R. 10 Mad. 66.

(6) (1914) 19 C. W. N. 1167,

(7) (1912) 16 C. L. J. 83.



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which hold that article 181 is applicable. It is further plain that the view taken in *Dinanath v. Jogendranath* (1) must inevitably lead to grave injustice. No application for restitution is possible till the erroneous decree or order has been set aside or superseded. It is difficult to see on what principle time may be deemed to run against the judgment-debtor while the erroneous order is still in force; on the other hand, the judgment of Sir Barnes Peacock, C. J. in *Joykurun Lal v. Asmudh Kooer* (2) shows that the right of action does not accrue to the judgment-debtor before the erroneous decree has been superseded, and time runs against him only from that date, even if he institutes a regular suit for recovery of the profits. The same view is supported by the decisions in *Surmo Moyee v. Shooshee Mokhee* (3); *Dhunput v. Saraswati* (4); *Rangayya v. Bobba* (5) and *Holloway v. Guneswar* (6) which will be found reviewed in *Raghu Singh v. Sheo Prasad* (7). It is interesting to note that a similar view has been repeatedly adopted in the Courts of the United States, where it has been ruled that when a person receives money under a decree which is afterwards reversed on error, the statute of limitation commences to run in his favour only from the reversal: *Bank of Washington v. Neale* (8); *Crocker v. Clements* (9); *Florence v. Louis Ville* (10). We feel no doubt whatever that, in the case before us, grave injustice would result if we were constrained to hold that the claim for restitution was barred, because the decree-holders had managed, under an erroneous decision on a question of limitation, to take away the money of the judgment-debtors and to retain it for a longer term than three years, by reason of delay in the disposal of the appeal by this Court.

The fifth point for consideration<sup>\*</sup> is, whether the decree-holders are entitled to have an enquiry as to the ownership of the fund which was attached in execution of their decree. We are clearly of opinion that the matter must be investigated. That the money stood in the name of two of the judgment-debtors is by no means conclusive; but such enquiry will be made only after the money has been brought back into Court pursuant to the directions we are about to give.

(1) (1914) 19 C. W. N. 1167.

(2) (1866) 5 W. R. 125.

(3) (1868) 12 M. I. A. 244.

(4) (1891) I. L. R. 19 Calc. 267.

(5) (1903) I. L. R. 27 Mad. 143 P. C.

(6) (1905) 3 C. L. J. 182.

(7) (1912) 16 C. L. J. 135

(8) (1835) 4 Cranch C. C. 627.

(9) (1853) 23 Alab. 296.

(10) (1903) 138 Alab. 593; 100 Am. St. Rep. 50.

The sixth point for consideration, is, whether restitution must be made of the sums withdrawn, together with interest thereon. We are of opinion that interest must be paid by the decree-holders at the rate of 6 per cent per annum from the date of withdrawal to the date of repayment into Court : *Rodger v. Comptoir Descompte de Paris* (1) ; *Merchant Banking Co. v. Maud* (2) ; *Imperial Mercantile Credit Association v. Coleman* (3) ; *Forester v. Secretary of state.* (4). The order of the Court below which allows interest at 12 per cent must accordingly be varied in this respect.

The result is that this appeal is allowed, and the order of the Subordinate Judge discharged. The decree-holders are hereby directed to bring back into Court, within one month from this date, Rs. 3781-9-0 together with interest thereon at 6 per cent. per annum from the 25th. September, 1909 to the date of repayment into the Court. The sum so deposited will be invested in such manner as the Court may direct. The fund will be deemed to have been attached in execution of the decree of the decree-holders against Jogendraprasad Mitra. The Court will then proceed to determine what portion of the fund, if any, is the property of Jogendraprasad Mitra, and the decree-holders will be at liberty to apply such portion only in satisfaction of their decree. To prevent possible dispute we may add that should it turn out on investigation that the fund did in whole or in part belong to Jogendraprasad Mitra the decree-holders will be entitled to receive therefrom not merely the judgment-debt but also interest thereon at 6 per cent per annum from the date of the decree till the date of realisation ; credit will be allowed to the judgment-debtors for sums previously paid or realised in satisfaction of the decree. The execution case No. 93 of 1909 will stand revived, the order for satisfaction of the decree, made on the 25th September 1909, will stand cancelled, and the enquiry directed will be held in the execution case so restored. If the money is not brought into Court as directed, the Court below will proceed to realise the sum by execution from the decree-holders in the usual manner. There will be no order for costs either here or in the Court below in these proceedings ; but as the Subordinate Judge made his order on a preliminary point i. e., on the ground that the matter was concluded by our order of the 9th. January, 1914, we direct, under

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(1) (1871) L. R. 3 P. C. 465.

(2) (1875) L. R. 18 Eq. 659.

(3) (1871) L. R. 6. Ch. App. 558.

(4) (1877) L. R. 4 I. A. 137 ; I. L. R. 3 Calc. 161.

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section 13 of the Court-Fees Act, that the amount paid as court-fees on the memorandum of appeal be refunded to the appellants. In this view, it is unnecessary to determine whether court-fees were payable *ad valorem* on the memorandum.

A. T. M.

*Appeal allowed.*

## PRIVY COUNCIL.

PRESENT :—*The Lord Chancellor (Lord Buckmaster), Lord Atkinson and Sir John Edge.*

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

*Limitation—Application for execution of decree—Step in aid of execution—“Proper Court” for execution—Indian Limitation Act (XV of 1877), Sch. II Art. 179—Code of Civil Procedure (Act XIV of 1882) Secs. 223, 224, 228, and 230.*

Where a decree had been transferred by a District Court to a Munsiff's Court for execution by the latter Court, and had not been returned, and where a subsequent application for execution by sale of the property within the jurisdiction of the Munsiff's Court was made to the District Court :

*Held*, that, having regard to sections 223, 224, 228 and 230 of the Code of Civil Procedure, 1882, the proper Court to which the application should have been made was the Court of the Munsiff; that the Court of the District Judge was not the proper Court; and that the application to that Court was not a “step in aid of execution” available to keep the decree alive under Art. 179 of Sch. II of the Indian Limitation Act, 1877.

*Ex parte* Appeal from a decree of the Madras High Court (1) (Sankaran Nair and Ayling JJ.) dated the 2nd of May 1912, affirming an order of the District Judge of Vizagapatam, dated the 25th October, 1910.

The question for determination was whether an application for execution of a decree presented by the appellant was barred by limitation. The facts are fully stated in their Lordships' judgment and in that of the Madras High Court. The latter judgment was as follows :—

“The question is whether the plaintiff's application is barred by limitation. The plaintiff obtained a decree is O. S. No. 11 of 1903,

(1) (1912) 12 M. L. T. 119; 23 M. L. J. 236.

on the file of the District Court of Vizagapatam. The decree was transferred to the District Munsiff's Court of Parvatipur for execution on the 3rd of October 1904. The decree-holder got certain immovable properties attached, but the petition was dismissed on the 10th March 1905 and no further steps were taken in the District Munsiff's Court. The decree-holder then applied to the District Court at Vizagapatam on the 13th December 1907 for the sale of the property attached by the District Munsiff. The petition was returned for amendment, under section 235 of the Code of Civil Procedure of 1882. It was represented without amendment and was then recorded without being registered. The decree-holder makes this present application on the 21st April 1910 for notice and for the realization of the amount by sale of the properties already attached. The question whether the last application is barred by limitation depends on the question whether the application of the 13th December 1907 to the District Court was in accordance with the law and to the proper Court.

"The application of the 13th December 1907, prayed for notice under section 248 of the Civil Procedure Code of 1882 and the decision of the District Judge that such application must be treated as a step in aid of execution is in accordance with the decision in *Pachiappa Achari v. Poojali Seenan* (1).

"The only question that remains therefore for decision is whether the application is made to the proper Court. The District Judge decides that the proper Court to which the application should have been made was the District Munsiff's Court of Parvatipur to which the decree had been transferred for execution and that therefore the present application is barred. Under section 223 of the Civil Procedure Code of 1882 (section 41 of the present Code) the Munsiff's Court of Parvatipur to which the decree was sent for execution has to certify to the District Court of Vizagapatam the fact of such execution or if the Munsiff's Court fails to execute the decree, the circumstances attending such failure. Till that is done, the Munsiff's Court retains its jurisdiction to execute the decree. See *Abda Begam v. Muzafer Husen Khan* (2). There is no doubt therefore that the Munsiff's Court had jurisdiction to entertain a similar application for sale, though that Court dismissed the application for execution in 1905. This was not denied in argument before us.

"The next question is, whether that is the only Court to which this application could be made or had the District Court also jurisdiction

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to order the sale of the property. Under section 38 of the Civil Procedure Code of 1908 (section 223 of the Code, Act XIV of 1882) the decree may be executed either by the Court which passed or by the Court to which it is sent for execution. This in itself does not authorize the District Court of Vizagapatam which passed the decree to execute it after it had been sent for execution to the Munsiff's Court of Parvatipur. Section 39 states the conditions under which a decree may be sent to another Court for execution. Under clause (c) it may be sent for execution to another Court if the Court directs the sale or delivery of immovable property situated outside the limits of the jurisdiction of the Court which passed the decree, and presumably within the limits of the jurisdiction of the Court to which it is sent for execution. The reason for the transfer in this case is plain enough. By clause (a), it may also be sent to another Court if the judgment-debtor resides there or carries on business or works for gain within the limits of the jurisdiction of that Court. Under clause (b), if the judgment-debtor has no property within the jurisdiction of the Court which passed the decree sufficient to satisfy the decree and has property within the limits of the jurisdiction of the Court to which it is sent, the decree may be sent to that Court for execution. Under Clause (d) of section 39, 'if the Court which passed the decree considers for reasons which shall be recorded in writing that the decree should be executed by another Court, then also the decree may be sent to another Court for execution.' This section does not say that after the decree has been sent to another Court for execution, the Court passing the decree may not simultaneously carry on execution proceedings, but it is plain enough that section 39 intends that it is only for special reasons that the decree should be sent to another Court for execution. Thus, if there is sufficient property by the sale of which the debt may be realized ordinarily, no Court would be justified in sending the decree to another Court for execution. At the same time, it is quite possible that concurrent execution may be necessary. If, for instance, a property within the jurisdiction of the Court which passed the decree is comparatively not of much value and the property within the jurisdiction of the Court to which the decree is sent is also not comparatively of much value, then there can be no injustice to the judgment-debtor in carrying on execution proceedings in both the Courts. If the decree is sent for execution to two or more Courts to be executed at the same time and the amounts realized on the aggregate may be much higher than the judgment-debt, it would manifestly be an injustice to the

judgment-debtor to allow the execution proceedings to go on at the same time. Furthermore, if the full amount of the decree is realized by two or three Courts, it is difficult to see how matters can be worked out, which of the sales is to be held valid and on what grounds, and what interests would be acquired by the purchasers at these sales. It is true the judgment-debtor may apply for stay of execution proceedings under order 11, rule 26, but he is not entitled to get the execution proceedings stayed. While therefore these sections may not show that concurrent execution cannot be carried on, they certainly show that such execution should be allowed only in exceptional circumstances. It is only when such execution is necessary in the interests of the decree-holder and when it can be carried on without hardship to the judgment-debtor, that it ought to be allowed by the Court which passed the decree. The other provisions show that such Court apparently retains control over the execution proceedings. When the decree has to be executed against the representative of the judgment-debtor, then according to section 50, the application has to be made to that Court which passed the decree. When a decree has to be executed at the instance of the assignee of the decree-holder, then also the application has to be made under order 11, rule 16, to the same Court. Then again, power is given to such Court to stay the execution proceedings in the Court to which the decree is sent for execution. When, therefore, concurrent execution is necessary, the Court which passed the decree may order it. But till such order is passed and permission is given to the decree-holder to execute the decree simultaneously in more than one Court, he is not entitled to carry on execution proceedings at the same time. The decisions seem to bear out this view. In *Saroda Prosaud Mullick v. Luchmeeput Singh Doogur* (1), their Lordships of the Privy Council held that it was open to a Court to send the decree for execution to three Courts at the same time. This decision was passed under the Civil Procedure Code of 1859. It may be pointed out that under section 286 of that Code, the Court was bound to transmit the decree for execution to another Court, "unless there be special reasons to the contrary." Under the Codes of 1882 and of 1908, it is optional with the Court to send it to another Court. Under section 284 of the Code of 1859, their Lordships point out, that when the decree is sent for execution to another Court, conditions may have to be imposed upon the decree-holder. This also shows the necessity of the exercise of

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judicial discretion. In the case, *Krishtokishore Dutt v. Rooplall Dass* (1) also there was an order by the Court which passed the decree for simultaneous execution. These decisions are authorities for the proposition that decrees may be executed simultaneously in more than one Court but in all these cases, there were orders allowing such execution and the considerations that I have already set out would seem to indicate the necessity of an order permitting concurrent execution before such execution proceedings can be carried out. In the present case, after the decree was transferred for execution to the Parvatipur Munsiff's Court, that Court had seisin of the execution proceedings and it was bound to carry them on until execution was obtained or further execution became impossible. There was no order of the District Court of Vizagapatam staying execution in that Court, for the purpose of executing the decree in the Vizagapatam Court itself. I am, therefore, of opinion that the Judge is right in holding that the application for sale in 1907 should have been made to the Parvatipur Munsiff's Court and that the District Court was not therefore the proper Court to entertain such an application. The present application is therefore barred. I confirm the order of the District Court and dismiss this appeal with costs."

The appellant then appealed to His Majesty in Council.

*De Gruyther K. C.* (*B. Dube* with him) for Appellant: The application of the 27th April 1910 was not barred by time; it was kept alive by the previous application dated the 13th December 1907 made to the District Judge. The District Judge was a proper Court to entertain that application within the meaning of explanation 2 to article 182 of the Indian Limitation Act, 1908. Where the District Judge sent the decree for execution to the Munsiff of Parvatipur, his own subordinate, he was not deprived of his jurisdiction in respect of the decree.

The Court to which a decree is sent for execution can only execute it as it stands: questions as to its validity have to be determined by the original Court: Code of Civil Procedure, 1882, sections 226, 228, 232, 223, 234. I cite these sections to show that the Court which sends a decree for execution still retains a control over it.

[*The Lord Chancellor*: The point in this case is whether it is a condition precedent to your applying to the District Court that you should get the decree back].

A decree may be executed simultaneously in more than one Court: *Krishtokishore Dutt v. Rooplall Dass*, (1) cited by the

High Court was followed quite recently in *Baij Nath Goenka v. F. H. Holloway* (1).

The decree-holder was informed by the Munsiff's office that the decree had been returned to the District Court with a certificate of non-satisfaction. Under these circumstances, it ought to be held that the District Court was a proper Court to which to apply.

The Respondents did not appear.

Their Lordships' judgment was delivered by

**Sir John Edge** :—This is an appeal from a decree, dated the 2nd May, 1912, of the High Court at Madras, which affirmed an order dated the 25th October, 1910, of the District Judge of Vizagapatam dismissing an application of the 27th April, 1910, for the execution of a decree of the 5th April, 1904, on the ground that the application was time-barred when it was made. The question as to whether the application of the 27th April, 1910, was barred by limitation depends on whether a previous application for the execution of the decree which had been made on the 13th December, 1907, was made to the proper Court within the meaning of article 179 of the second schedule of the Indian Limitation Act, 1877. The period of limitation applicable in this case was three years from the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree. The respondents have not appeared and have not been represented in this appeal. The facts, as their Lordships have ascertained them from the papers in the record before them, may be briefly stated.

The appellant, on the 5th April, 1904, obtained a money decree against the respondents in the Court of the District Judge of Vizagapatam.

In September 1904 the appellant presented a petition to the Court of the District Judge by which he prayed that the decree should be sent to the Court of the Munsiff of Parvatipur for execution on the ground that the properties of the respondents were situate within the local limits of the jurisdiction of the Court of the Munsiff, and thereupon the District Judge by his order of the 30th September, 1904, made under section 223 of the Code of Civil Procedure, 1882, sent the decree for execution to the Court of the Munsiff of Parvatipur, and in compliance with section 224 of that Code sent to the Court of the Munsiff (a) a copy of the decree ; (b) a certificate that satisfaction of the decree had not been obtained

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by execution within the jurisdiction of the District Court ; and (c) a certificate that no order for the execution of the decree had been made except the order for the transfer of the decree.

On the application of the appellant the Court of the Munsiff of Parvatipur in execution of the decree attached immovable property of the respondents which was within the local limits of the jurisdiction of that Court. Subsequently on the 10th March, 1905, two months' time was, on their application, granted by the Court of the Munsiff under section 305 of the Code of Civil Procedure, 1882, to the respondents, and it is stated that the petition for execution was dismissed. No further steps were taken to get the decree executed by the Court of the Munsiff.

On the 9th July, 1907, the appellant applied to the Court of the Munsiff for a copy of the decree which had been sent to that Court under section 224 of the Code of Civil Procedure, 1882, and by order of the head clerk to the Court of the Munsiff of the 11th July, 1907, he was informed that "No. Copy of decree in record. It appears that it was returned to the District Court with non-satisfaction certificate." That information was incorrect. On the 13th December, 1907, the appellant presented a petition to the Court of the District Judge in which he alleged that he had presented in 1905 a petition to the Court of the Munsiff of Parvatipur for the attachment of the immovable property of the respondents ; that the attachment was made ; and that subsequently the decree had been re-transferred to the District Court ; and prayed (1) "that the property described in the schedule hereto attached may be sold under section 287 of the Civil Procedure Code for the realisation of the amount mentioned in column 8, and further costs in execution" ; and (2) that notice under section 248 of the Code of Civil Procedure 1882, might be issued to the respondents. No property was, in fact, described in the schedule, but in their Lordships' opinion it is plain that the object of this petition was to obtain from the Court of the District Judge an order for the sale of the property which had been attached by order of the Court of the Munsiff. The petition, being defective, was returned to the appellant for amendment, and without having been amended was again presented to the Court of the District Judge on the 28th January, 1908 ; the fact that it had been presented was, by order of the District Judge, recorded on the 25th March, 1908, but nothing further appears to have been done on that petition.

The next thing which happened was that, on the 27th April, 1910, the appellant presented to the Court of the District Judge a

petition for the execution of the decree by sale of the immovable property which had been attached by the Court of the Munsiff. In that petition the appellant alleged that the decree had been returned by the Court of the Munsiff to the Court of the District Judge. On the 12th July, 1910, the District Judge directed that the Munsiff of Parvatipur should be requested to report whether the copy of the decree was re-transmitted to the District Judge's Court, and, if so, when. On the 3rd August, 1910, the Munsiff of Parvatipur returned to the Court of the District Judge the copy of the decree which had been sent to the Munsiff's Court for execution and the certificate of non-satisfaction. In October 1910 the District Judge proceeded to deal with the petition of the 27th April, 1910, of the appellant, who was represented by a vakil, and on the 25th October, 1910, held that the petition of the 27th April, 1910, had not been presented to the proper Court, and that the petition of the 13th December, 1907, not having been presented to the proper Court the presentation of the latter petition did not prevent limitation running, and dismissed the application for execution as having been time-barred, and also apparently as having been presented to the wrong Court.

The appellant appealed to the High Court at Madras, which by its decree of the 2nd May, 1912, affirmed the order of the District Judge of the 25th October, 1910. From that decree of the High Court this appeal has been brought.

As the decree of the 5th April, 1904, had by order of the Court, of the District Judge been sent on the 30th September, 1904, to the Court of the Munsiff of Parvatipur for execution by the latter Court, and as the copy of the decree with the non-satisfaction certificate was not returned to the Court of the District Judge until the 3rd August, 1910, and as the petition of the 13th December, 1907, was for execution of the decree by sale of the immovable property of the respondents which was within the local limits of the jurisdiction of the Munsiff's Court, their Lordships, having regard particularly to sections 223, 224, 228, and 230 of the Code of Civil Procedure, 1882, are satisfied that when that petition of the 13th December, 1907, was presented to the Court of the District Judge that Court was not the proper Court to which the application to execute the decree by sale of the immovable property which had been attached by the Court of the Munsiff should have been made, and that the proper Court to which that application should have been made was the Court of the Munsiff of Parvatipur, as that was the Court whose duty it then was to execute the decree so far as it could be executed by that Court. Consequently, the application by the petition of

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the 27th April, 1910, was, when made, time-barred under article 179 of the second schedule of the Indian Limitation Act, as no application had been made within three years in accordance with law to the proper Court for execution, or to take some step in aid of execution, of the decree. Further, their Lordships agree with the District Judge that the application of the 27th April, 1910, was not made to the proper Court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

*Douglas Grant*:—Attorney for the Appellant.

Respondents did not appear.

J. M. P.

*Appeal Dismissed.*

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## PRIVY COUNCIL.

PRESENT :—*Lord Chancellor (Lord Buckmaster), Lord Atkinson, and Sir John Edge.*

NANDALAL DHUR BISWAS, SINCE DECEASED (NOW REPRESENTED BY BANGA CHUNDRA DHUR BISWAS AND ANOTHER) AND ANOTHER

*v.*

JAGAT KISHORE ACHARJYA CHOWDHURI AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

*Hindu Law—Sale by a Hindu widow—Legal necessity—Onus Probandi—Recitals in deeds—Weight to be attached to them as against third parties—Attestation of a deed does not by itself create estoppel against or imply consent of the attesting reversioner—Dilatory conduct of appeal to Privy Council—Costs.*

Where a Hindu widow, who is only entitled to the usufruct of her deceased husband's property, purports to dispose of his whole estate, the burden of proving that the disposition was made under the circumstances of legal necessity rests on the purchaser however great the lapse of time.

*Maheshwar Baksh Singh v. Ratan Singh* (1) followed.

Recitals in a deed cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain.

Under ordinary circumstances and apart from statute, recitals in a deed of sale can only be evidence as between the parties to the conveyance and those who claim under them. Where a very long time has elapsed between the date of the deed and the institution of the suit challenging the sale, such recitals cannot be disregarded, although, on the other hand, no fixed and inflexible rule can be laid down as to the proper weight which they are entitled to receive. If the deed is challenged at the time or near the date of its execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts establishing legal necessity. But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance, and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper inquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry

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would have confirmed its truth, then, when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, will be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time.

Necessity for maintenance of Hindu widows is a legal necessity but that maintenance need not be measured merely by a sufficient sum to support bare existence.

Attestation proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions. It can, at the best, be used for the purpose of cross-examination, but by itself it will neither create estoppel nor imply consent.

*Hari Kishen Bhagat v. Kashi Pershad Singh* (1) followed.

Where there is considerable delay (delay of seven years in the present case) in setting down an appeal for hearing, a successful appellant will not be allowed costs unless he clears himself of the imputation of having needlessly protracted the proceedings.

Six consolidated appeals from a judgment and eight decrees of the Calcutta High Court (Chitty and Carnduff JJ.) (August 16, 1909), reversing a judgment and six decrees of the Subordinate Judge of Mymensingh (September 17, 1906).

One Braja Narayan Dhur Biswas died in 1845 childless, leaving two widows, Golokemoni and Joydurga. Between 1848 and 1863 the widows by sundry conveyances sold practically the whole of the property to sundry purchasers. The sales purported to be for legal necessity and to convey to the purchasers the whole estate. Golokemoni died in 1890 and Joydurga in 1902. In 1905 Nandalal Dhur Biswas, claiming to be the reversionary heir of Braja Narayan and one Jogesh Chundra Chackravarti who had purchased a half share of Nandalal's rights, instituted the present suits against the respondents and other successors in title of the purchasers, claiming that the several sales were fraudulent and collusive and not made for legal necessity and praying for recovery of possession, for mesne profits and for other relief.

Various issues were raised, but the only one now important was whether the sales were for legal necessity. The Subordinate Judge held they were not, and decreed the suits; the High Court (Chitty and Carnduff JJ.) reversed this finding and dismissed the suits with costs. After disposing of other questions arising in the case they observed as follows:—"It is not now contended that those alienations were not made *bona fide* and for good consideration. The only

question is whether there was legal necessity for such alienations." After giving a list of the alienations, as given in their Lordships' judgment, the learned Judges concluded as follows :—

"The documents, one and all, contain recitals of debts and necessity for raising money. They are not conclusive proof but may be considered with the other evidence. They cannot be entirely disregarded. It will be seen that the alienations extended over a period of 17 years, and were for an aggregate amount of Rs. 2,900. The last of them took place more than 40 years before this suit came on for hearing. It could not, therefore, be expected that there would be extraneous oral evidence of much value with regard to the state of the widows at the time and to the necessity for raising money. The learned Subordinate Judge has discussed at length the evidence of the various witnesses called for the defence in this connection and given his reasons for disregarding it. We agree with him that it is of no great value in matters of detail. But we are not prepared to say that the whole body of this evidence is false. The witnesses could not be expected to remember details of accounts of 40 to 50 years ago. At the same time the burden of proof, which is undoubtedly upon the defendants, will not lie so heavily upon them in a case like this where the alienations have gone unchallenged for so many years, and evidence at first hand it is difficult, if not impossible, to procure. There is evidence which may safely be relied upon, that although Braja Narayan died possessed of considerable property, he also was heavily indebted. The names of his creditors are given Hukum Chand Saha, Biswambar Saha and Kartik Saha. There were undoubtedly decrees against him, to satisfy which some of these alienations were made. There is another circumstance which tells strongly against the plaintiff Nandalal and that is that he appears to have attested the documents Exhibit F and Exhibit E, the conveyances to the Wises. It is unfortunate that the original documents have been lost. The certified copies, however, obtained from the registration office show Nandalal of Usthi as a witness to each document. What is more, Exhibit F purports to have been attested also by Ram Nath Dhur and Ram Kanta Dhur of Usthi, and Exhibit E by Ram Kanta Dhur of Usthi. These are, no doubt, the uncles of plaintiff No. 1, and if his story of relationship was true, would at those dates been the next reversioners. It is true that Nandalal says that he has no recollection of having attested those documents, but he is constrained to admit that there is not, and never has been, so far as he can remember, any other Nandalal Dhur of Usthi besides himself.

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The inference seems irresistible that he did attest both these documents. What is the effect of such attestation? It appears to us that it creates very good evidence of the legal necessity in these two instances. We must also consider the lapse of time. The plaintiff No. 1 was not legally bound to assert his rights during the lifetime of the widows, but the fact that he did not do so, that he took no steps to assume possession of the property on Joydurga's death, and that he did not file this suit for three years from that date, coupled with the fact that he attested and so presumably consented to these two alienations, tells, in our opinion, most strongly against him. With reference to the kobala of 17th June 1853 (Exhibit 5), the plaintiffs rely upon the truth of the recital that Braja Narayan left no authority to adopt. If they do this, they cannot reasonably deny the truth of the recital as to legal necessity, which immediately follows. Upon the whole, we are of opinion that there is sufficient evidence upon the record of legal necessity for these alienations. It is not necessary to discuss the other points which were raised and which are peculiar to particular suits. We may, however, say that as regards suits 11 and 12, it does not appear that Chur Mandalia was the self-acquired property of the widows. There is no evidence that they were ever in a position to acquire any property. They were unable to keep in tact even that which had come to them from their husband. We are of opinion that the plaintiffs' suits must fail for the reasons recorded above. These appeals (other than Appeal 297 which was preferred by the appellants) are allowed, and the plaintiffs' suits dismissed with costs in both Courts. Hence these appeals.

*L. De. Gruyther* K. C. and *Sir W. Garth* for the Appellants.

*Sir Erle Richards* K. C. and *Dunne* for the respondents.

[At the opening of the appeal the *Lord Chancellor* drew attention to the delay of nearly 7 years in bringing the appeal before the Board for hearing which amounted to grave oppression of the parties found to be rightly in possession. The Board were determined in future to visit the party in fault with costs even if successful ]

*De Gruyther* remarked that the delay in such cases was mainly due to the officers of the High Court : Explained the various steps of procedure.

[*The Lord Chancellor* enquired as to the relevant dates in this particular appeal. The net result, he said, was that the property concerned had been tied up for 11 years, during which period the party hitherto held to be in rightful possession could not say whether

it was his or not. In the eyes of the Board this was a very serious matter.]

The matter then dropped and *De Gruyther K. C.* for the appellants submitted that the sales here were not made for legal necessity. The burden of proving such necessity in the case of purchases from a Hindu widow, lies upon the purchaser : *Hunooman Pershad v. Babooee Munraj* (1) ; *Maheshwar Baksh v. Ratan* (2) ; *Sham Sundar v. Achhan* (3) referred to.

(The Lord Chancellor : Does this liability to be challenged go on for ever? There must come a time when it is impossible to prove necessity).

The purchaser is always liable to be challenged. No doubt after a great length of time less proof will be required. The purchaser could have preserved evidence had he so desired.

(The Lord Chancellor : Is there no such principle in Hindu law that after a certain length of time, things should be presumed to be right?)

Not with regard to dealings with widows ; otherwise you might get a title by mere lapse of time.

(The Lord Chancellor : That is not very shocking ; it is far more shocking that your title should get worn as time goes on).

The purchaser should foresee the difficulty and preserve evidence. You cannot dispense with the necessity of some evidence. It all depends on (1) where the burden of proof lies and (2) has that burden been discharged. You must have some evidence other than mere presumption arising from lapse of time.

Recitals in deeds are not of themselves evidence of legal necessity : *Brij Lal v. Inda Kunwar* (4).

(The Lord Chancellor : That case does not say that they are to be disregarded altogether, but merely that they are not evidence in themselves).

You have to connect the sales with the debts alleged. With one exception there is no other evidence of any of these debts. The accounts of the business firms from whom the money was borrowed might have been produced. There is no evidence that decrees were in fact passed against the deceased, or that creditors were paid. In one case the necessity alleged is the performance of a *Sradh*, but a widow can only dispose of a reasonable portion of

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(1) (1856) 6 M. I. A. 393.

(2) (1896) L. R. 23 I. A. 57 ; I. L. R. 23 Calc. 766.

(3) (1898) L. R. 25 I. A. 183. (4) (1914) I. L. R. 36 All. 187.



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the estate for such a purpose : Mayne's Hindu law, section 632 (5th Ed. p. 878).

In some cases respondents rely upon the attestation of the deed by the reversioners ; but such attestation does not necessarily import consent on their part : *Hari Kishen v. Kashi* (1).

*Sir W. Garth* who followed, was asked by the Lord Chancellor if he admitted that the necessity of the widow was greater according to the social position she occupied.

*Sir W. Garth* : Natives in India can live upon what would seem to us an inconveniently small sum ; prosperity is not measured there as it is here ; only those who have been in India can appreciate the difference. Hence the deceased was accounted well off, and yet his widows say they could live on what he left them.

*Sir Erle Richards K. C.*, for Respondents, was asked by the Lord Chancellor how he made the recitals evidence ? In England they are made evidence by Statute, but there is no such Statute in India.

I admit that representations, true or false, would bind the widows but no one else. I submit that the evidence here discharges the onus which is on me. As observed by Knight Bruce L. J. in *Hunooman Pershad v. Babooee* (2), "The presumption proper to be made will vary with circumstances and must be regulated by and dependent on them."

(The Lord Chancellor : The recitals are evidence of representation. It is such a long time ago. It is "reasonable," as observed in that case (p. 420) to require *prima facie* proof.)

There must be some presumption that the lender made enquiries before advancing the money.

*Maheshwar Baksh Singh v. Ratan Singh* (3) was a very different case from the present : there was no statement there that the debts were the debts of the husband, apparently they were not.

*Hari Kishen v. Kashi* (4) was not a case of necessity at all ; there were concurrent findings that no necessity existed.

(The Lord Chancellor : That case was cited on the point as to attestation. The mere attestation of a deed cannot affect the attester with a knowledge of its contents. I do not see how you can bring home knowledge to him).

(1) (1914) L. R. 42 I. A. 64 ; 21 C. L. J. 225 ; I. L. R. 42 Calc. 876.

(2) (1856) 6 M. I. A. 393 (419).

(3) (1896) L. R. 23 I. A. 57 ; I. L. R. 23 Calc. 766.

(4) (1914) L. R. 42 I. A. 64 ; 21 C. L. J. 225 ; I. L. R. 42 Calc. 876.

It is some evidence ; when you get members of a family witnessing deeds it means that they know something of the transaction the deed is made for. As a general rule, all the family know what is going on.

*Dunne* followed.

*De Gruyther K. C.* replied.

The judgment of their Lordships was delivered by

**The Lord Chancellor :—**These six consolidated appeals arise out of six suits commenced by one Nandalal Dhur Biswas and Jogesh Chandra Chakravati, claiming against the various defendants possession of certain lands. The first-named plaintiff has died since the institution of the suits, and his representatives, together with the other plaintiff, are the present appellants.

The property in question formed the whole estate of one Braja Narayan, deceased, and was the subject of certain conveyances executed at various dates by one or both of his two widows. The first-named plaintiff alleged that he was the adopted son of Braja Narayan, but this claim, though supported by the Subordinate Judge, who decided in favour of the plaintiffs in all the suits, was rejected by the High Court, from whose judgment these appeals are brought, but it is not necessary to consider this question unless the conveyances can be set aside. Now it is clear that in the circumstances these conveyances cannot be supported unless it is established that the sales they purported to effect were made under circumstances of legal necessity, justifying the widows, who were only entitled to the usufruct of the property, in disposing of the entire estate.

The burden of proving that the dispositions were lawful rests on the respondents : see *Maheshwar Bakshi Singh v. Ratan Singh*, (1).

The facts of the case are these. Braja Narayan was a Hindu, who lived in the village of Ushti. He occupied a position of some importance in the village and died in 1845, childless, leaving two widows, Golokemoni and Joydurga, who succeeded him as joint heiresses of his property. Golokemoni died on the 8th June, 1890, and Joydurga on the 6th June, 1902. During their lifetime they disposed of all the property inherited from their husband by the following deeds :—

12th August, 1848 : Both widows to Radha Kanta Das, for 175 rupees.

17th June, 1853 : Both widows to Kali Narayan Roy Chowdhuri, for 1,000 rupees.

(1) (1896) L. R. 23 I. A. 57 ; I. L. R. 23 Calc. 766.

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26th December, 1856 : Golokemoni to G. P. Wise, for 350 rupees.

10th December, 1859 : Golokemoni to Goloke Nath Das for 250 rupees.

23rd September, 1860 : Joydurga to T. A. Wise, for 700 rupees.

4th December, 1860 : Golokemoni to Bejoya Gupta, for 110 rupees.

18th September, 1864 : Golokemoni to Golok Chandra Das, usufructuary mortgage, for 100 rupees by an ijara patta.

1st July, 1865 : Joydurga to Shaik Dhondi, for 215 rupees.

It was originally asserted that these sales were at an undervalue, but the appellant failed to establish this contention, and it has been now definitely abandoned. It may, therefore, be accepted—and it is a material circumstance—that the whole property was disposed of at its full value by small conveyances realising sums from 175 rupees up to 1,000, and each of the deeds contains recitals alleging various facts to show that there was legal necessity which would justify the transaction.

It is not necessary to examine each of these recitals in detail. Speaking generally the necessity which they put forward is the necessity of providing means for payment of debts of the deceased, of the expenses consequent on the *Sradh* and the satisfaction of debts incurred by the widows for the purpose of obtaining the money necessary for the payment of the debts of the deceased and of the expenses of religious ceremonies. In general terms, the facts recited would establish the necessity alleged but it is well established, that such recitals cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. Indeed it is obvious that if such proof were permitted the rights of reversioners could always be defeated by the insertion of carefully prepared recitals. Under ordinary circumstances and apart from statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them.

But in such a case as the present their Lordships do not think that these recitals can be disregarded, nor, on the other hand, can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts. But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant

points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance, and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time.

The present case well illustrates the necessity of this view. Nearly sixty years passed between the date of the first deed and the institution of these proceedings, and the attempt to support by contemporary evidence statements as to the private affairs of the deceased man or of his widows has only resulted, as might have been expected, in a number of witnesses attempting to give first hand evidence upon matters which occurred when they were of tender years, and now can only be dimly and imperfectly remembered. Their Lordships are not surprised that the learned Judge who tried the case rejected this evidence as untrustworthy, and they place no reliance upon it.

There are, however, facts which are not in dispute, and they appear to their Lordships sufficient to support the validity of the transactions which it is sought to challenge. The total value of the estate which the two widows inherited was 2,900 rupees. That some expense must have been incurred, and properly incurred, in connection with the *sradh* might be safely assumed. That the deceased should have left no debts at all is extremely improbable, and, indeed, one of the recitals referred in specific terms to a particular decree in favour of a named creditor. If no explanation whatever could be offered as to the absence of any record of this decree, the circumstance would place a difficulty in the respondents' way. But it appears that the records of the Court, by which the decree might reasonably be assumed to have been made, extending over a period from 1843 up to the death of the deceased, have been

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destroyed by an earthquake, and their Lordships are, therefore, not prepared to allow the lack of proof of the decree to weigh against the respondents' position.

Now the legal necessity that would support these conveyances is the necessity for maintenance of the widows, and that maintenance need not be measured merely by a sufficient sum to support bare existence. The periods at which the properties were sold, the small sums for which the sales were made, and the disposition of the property piece by piece with fair regularity for a period of sixteen years, all go to support the view that the widows found themselves unable to provide sufficient maintenance out of the income of the estate. It is impossible at this lapse of time to consider minutely the exact amount of money out of which these women might have maintained themselves. If the total amount of the estate had been such that it could safely have been assumed its usufruct would have provided a sufficient sum, different considerations would have arisen. But that is not the case. In 1865 all the property was exhausted and the widows' means were at an end. From that time until their death they lived with relations.

The circumstances, therefore, are sufficient to justify the assumption that proper enquiry would have disclosed that real necessity existed.

It is, however, urged on behalf of the appellant that even if this be so, the reasons urged in these recitals differ from the suggestion that the sale was necessary for the maintenance of the widows. Their Lordships do not accept this view. If money were needed for payment of the debts, the amount available for maintenance would to that extent be reduced, and if the debts had been paid by the widows out of borrowed money, it would make no difference whether they urged as the reason for the sale the necessity to pay the debts or the necessity of maintaining themselves.

It is admitted that there was only one fund available for all purposes. Whatever the debts of the deceased may have been, it was out of this fund that they had to be defrayed, and all proper and necessary expenses could only be provided from the same source. Their Lordships have entirely disregarded the verbal evidence upon the question of what debts were owing from the deceased. The learned trial Judge who tried the case rejected such evidence as untrustworthy, and the insistence of practical proof of the financial condition of the estate of a dead man after the lapse of sixty years can only result in the production of evidence which must, except in special circumstances, be untrustworthy. Their Lordships think it

right to add, in conclusion, that they do not agree with the decision of the High Court as to the effect of the attestation of two of the deeds by the appellant. They think it may be safely accepted that he did, in fact, attest them. But attestation proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions. It could, at the best, be used for the purpose of cross-examination, in order to extract from the witness evidence to show that he was, in fact, aware of the character of the transaction effected by the document to which his attestation was affixed. If it had been quite impossible for either of the widows lawfully to dispose of any interest in the property, and it was shown that the witness knew the nature of the deed, more value might be given to his attestation, but by itself it would neither create estoppel nor imply consent (see *Hari Kishen Bhagat v. Kashi Pershad Singh* (1).

In the opinion of their Lordships, these appeals should fail, and they will humbly advise His Majesty that they should be dismissed with costs.

Their Lordships cannot, however, part with this case without expressing their concern at the delay that has taken place.

The proceedings were instituted on the 20th May, 1905, the decrees of the Subordinate Judge were made on the 17th September, 1906, and the decrees of the High Court on the 16th August, 1909. Yet these appeals were not set down for hearing until April of this year. Their Lordships have been unable to extract any sufficient reason for this delay. The representatives of the parties over here may well be unable to furnish explanation, but unexplained it constitutes a grave reproach to the administration of justice. All the respondents have been unjustly attacked in the lawful possession of their property, and for nearly seven years they have been subject to the anxiety and distress of knowing that the judgment of the High Court in their favour was subject to the inevitable uncertainties of the law. Had this appeal succeeded their Lordships would have refused to allow the appellants any costs of the appeal unless they could have cleared themselves of the imputation of having needlessly protracted the proceedings, and the same course will be taken in similar cases in the future should the occasion arise.

*T. L. Wilson & Co* : Solicitors for the Appellants.

*Watkins and Hunter* : Solicitors for the Respondents.

J. M. P.

*Appeals dismissed.*

(1) (1914) L. R. 42 I. A. 64; 21 C. L. J. 225.

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PRESENT :—*The Lord Chancellor (Lord Buckmaster), Lord Atkinson, and Sir John Edge.*

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THE CORPORATION OF CALCUTTA.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT  
WILLIAM IN BENGAL.]

*Compensation—Removal of fixtures by Calcutta Municipal authority—Whether payment of compensation is a condition precedent to such removal—Court by which claim to such compensation is cognisable—Whether before removal a suit will lie to declare right to compensation in case of removal—Calcutta Municipal Act (Bengal Act III of 1899) Secs. 341, 617, 618, 619.*

The Calcutta Municipal Act provides that the Corporation shall compensate every person who suffers damage by the removal of fixtures erected before June 1, 1863.

The Corporation served J with notices under section 341 to remove certain structures and thereafter obtained orders from the Magistrate for their demolition, but took no steps to enforce those orders. J brought a regular suit in the Court of the Subordinate Judge against the Corporation claiming (1) declaration that the fixtures were erected before June 1, 1863, (2) declaration that she was entitled to compensation for the loss she would suffer by their removal, (3) declaration that the Corporation could not remove them till compensation was paid, (4) that the Court should fix the amount of the compensation, and (5) an injunction restraining removal till the compensation was paid :

*Held*, that on the true construction of section 341 (3), the assessment of compensation was not a condition precedent to the demolition of the structures.

*Held, also*, that Courts other than the Small Cause Court were, by section 617 debarred from fixing the compensation, and therefore as the suit sought relief under any but the first two heads, it was misconceived, but that J was entitled under section 42 of the Specific Relief Act, to a declaratory decree for the first two claims, the Corporation having denied her right to compensation until the hearing of the appeal against the decree of the Subordinate Judge.

Appeal from the decree of the High Court at Calcutta (June 11, 1913), reversing a decree of the Subordinate Judge of the 24-Pergunnahs (May 19, 1910).

The facts of the case are sufficiently set out in their Lordships' judgment. The main questions which arose on this appeal were (1) whether plaintiff was entitled to payment of compensation before her fixtures were removed and (2) whether a Court other than the Small Cause Court would entertain a suit for such compensation. Both these questions were decided in the affirmative by the Subordinate Judge but in the negative by the High Court. Hence this appeal.

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*De Gruyther, K. C.*, and *Sir W. Garth* for the Appellant : We do not dispute that compensation is contingent on the removal, but we contend that the Corporation cannot remove without first paying. They denied that the fixtures were erected before June 1, 1863, and we proved this only after a very long trial and at great expense. When we filed the suit the Corporation had an order, affirmed by the High Court, under which they could have removed the fixtures, and the removal itself would have made it impossible for us to prove when they were erected. Under the Lands Clauses Act of 1845 compensation is assessed before the interference with the property : to assess it afterwards will always be more difficult and in some cases practically impossible. "Suffers" in section 341 is equivalent to "will suffer". Section 617 of the Act, by which it is sought to exclude jurisdiction of the Subordinate Judge, is not exhaustive but merely provides a summary method of determining the amount of compensation at the instance of the Municipal authority. This is clear on referring to sections 618, 619. The first of which gives the Municipal authority only a summary remedy, while the second provides that they shall have the right to take regular proceedings.

(The Lord Chancellor referred to section 615.)

The Small Cause Court has no power to determine the question whether there is any right to compensation, but merely to fix the amount when the amount is admitted.

*A. M. Dunne*, for the Respondents, was asked to confine his argument to the first relief.

The relief by way of declaration is at the discretion of the Court : Specific Relief Act, section 42. The suit was not mainly for a declaration, the real object was to obtain payment before removal, but the Act does not contemplate such a payment—*vide* section 614, where the words used are "sustain damage" but when this suit was instituted there was no present cause of action for determining the amount of damage. We do not resist the appellants' getting the declarations, but they should not be allowed costs ; on all vital points they have failed. They could have had their declaration in the High Court, but there they contended that the decree awarding them compensation was right.

*De Gruyther, K. C.*, replied.

Their Lordships' judgment was delivered by

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**The Lord Chancellor :—**In this case the appellants are the owners of a bazaar in Kidderpur, which abuts upon two public streets known as Garden Reach Road and Diamond Harbour Road respectively. Along the frontages of these streets there are a number of verandahs or shops connected with the main buildings and erected upon culverts or platforms placed over drains which run by the side of the roads. The streets and drains are vested in the respondents as the Corporation of Calcutta, and they, on the 13th July, 1905, and the 21st April, 1908, served notices (under section 341 of "The Calcutta Municipal Act of 1899") upon the appellants, requiring the removal of these fixtures in Diamond Harbour Road and Garden Reach Road respectively. The provision of section 341, so far as it affects service of the notices, is not material, but it contains, in sub-section 3, certain provisions material to this dispute, which are in these terms :—

"If the owner or occupier of the building proves that any such fixture was erected before the first day of June, one thousand eight hundred and sixty-three, or that it was erected on or after that day with the consent of any municipal authority duly empowered in that behalf, the Corporation shall make reasonable compensation to every person who suffers damage by the removal or alteration of the fixture."

The appellants paid no attention to the notices, and the respondents accordingly made application to the Magistrate for demolition of the structures as to Diamond Harbour Road, on the 22nd November, 1905, and as to Garden Reach Road, on the 5th November, 1908. Orders were made on both these summonses—the first on the 22nd December, 1906, and on the second on the 27th May, 1909.

A rule *nisi* was obtained by the appellants to discharge the order relating to Garden Reach Road, but this rule was set aside on the 22nd July, 1909.

On the 6th August, 1907, the respondents, in answer to an application of the appellants, offered 178 rupees as compensation for certain of the erections in Diamond Harbour Road; on the 6th August, 1909, a similar application was made in respect of Garden Reach Road, and no reply having been received by the 20th August, 1909, these proceedings were instituted. At this time no steps whatever had been taken by the respondents to enforce the order for demolition, nor, excepting in respect of the one set of premises in Diamond Harbour Road, had they made any offer for

compensation if demolition took place. In fact, as appeared in the proceedings, the Corporation denied the right of the appellants to be compensated, upon the ground that, with a certain exception, the buildings in question, had not been erected before the 1st June 1863. The relief sought in the suit was ranged under five heads.

The first asked for a declaration that the structures in dispute had been affixed before the 1st June, 1863. The second, that the plaintiffs were entitled to compensation for the loss that they would suffer by their compulsory removal. The third, that the Corporation could not remove the structures until reasonable compensation had been paid. The fourth asked the Court to fix the amount of compensation. The fifth asked for an injunction restraining the Corporation from interfering with the structures until the compensation was paid.

The Corporation specifically denied the allegation that the structures in Garden Reach Road had been erected before the 1st June, 1863; but as to Diamond Harbour Road they gave a more qualified denial, and admitted that part of them had been erected before that date. They disputed that the payment of compensation was a condition precedent to the removal of the fixtures, and they alleged that under section 617 of the Calcutta Municipal Act the claim with regard to Diamond Harbour Road was bad in law, and that the suit could not be entertained by the Court.

The Subordinate Judge found in favour of the plaintiffs upon all the issues, and allowed compensation to the plaintiffs to the extent of 122,000 rupees. From his decree the respondents appealed to the High Court, and on the hearing of the appeal for the first time they admitted that all the fixtures in dispute had been erected before the 1st June, 1863; this admission having been made, the High Court reversed the decree of the Subordinate Judge, and dismissed the action with costs. From this judgment of the High Court the present appeal has been brought, seeking to restore in all particulars the decree of the Subordinate Judge.

The two questions of law that arise for consideration can be briefly disposed of.

The *first* relates to the true construction of section 341. Their Lordships cannot find anything in this section which renders the assessment of compensation a condition precedent to the demolition of the structures. The words of the section, which have already been quoted only provide for compensation to the person "who suffers damage" by the removal. Until the removal is effected no damage is in fact suffered at all, and there is but little advantage

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to be gained in considering, as Counsel for the appellants desired their Lordships to do, the questions of compensation under the Lands Clauses Act of 1845, or the consideration of whether, in certain circumstances, assessment of compensation ought to be a necessary condition precedent to interference with property. It is sufficient that, in their Lordships' opinion, the words of the statute, construed as they stand, do not furnish any ground upon which to support the appellants' claim.

The next point is whether, under section 617, the fixing of compensation in case of dispute is not placed in the Court of Small Causes, so that the question was not cognisable by the Court in which the present suit was instituted. Their Lordships think that, in this respect also, the judgment of the High Court was clearly correct. Omitting irrelevant and unnecessary words for the present purpose, section 617 provides this :—

“Where ... any municipal authority ... is required by ... this Act to pay ... compensation, the amount to be so paid, and, if necessary, the apportionment of the same, shall, in case of dispute, “be determined ... by the Court of Small Causes.”

Their Lordships find it quite impossible to understand how these words can be read so as to exclude the present dispute from their meaning ; and, indeed, Counsel for the appellants did not contend that section 617 read alone would bear that interpretation, but they suggested that the effect of sections 618 and 619 would be to show that section 617 was not intended to apply to claims by a person against the municipality, but only by the municipality against other parties. Now sections 618 and 619 refer to the means to be taken in order to obtain payment and recovery of expenses or compensation awarded in 617. And in both of these sections reference is made to the claim being a claim enforceable only against a person, the words “municipal authority” being omitted. The respondents say that in these sections, by virtue of certain interpretation clauses, the word “person” includes “municipal authority.” It may be so, but in their Lordships' opinion it is quite unnecessary to decide the question. Even assuming the appellants' view of sections 618 and 619 to be correct, it amounts to nothing more than this—that a special means of recovery of the amount awarded is given to the municipality which is not given to the individual, but from this it does not follow that the amount of compensation payable by the municipality to the individual, when in dispute, should not be fixed and determined under the earlier section. So far, therefore, as the

suit sought relief under any but the first two heads, it was misconceived, and the whole of the expenses thereby occasioned were thrown away.

Their Lordships think, however, that, in the circumstances of the case, the appellants were entitled to ask for relief under the first two heads of their claim. When the proceedings were started the Corporation was not prepared to admit the claim to compensation excepting in respect of a small portion of the premises in Diamond Harbour Road. Orders were outstanding for demolition. These orders might have been enforced at any moment, and, as the matter stood, they would have been enforced by the Corporation under an assertion that, except for a small amount, no compensation would be payable in respect of the damage done. This seriously affected the appellants' right of property in these structures, and they were entitled to ask for a declaration in respect of this right under the Specific Relief Act (section 42). It does not, of course, follow that the Judge would be bound to give the declaration sought, but their Lordships think that the discretion of the Subordinate Judge would have been rightly exercised in granting such a declaration or in making an equivalent order. When, however, the matter proceeded to the Court of appeal, the whole of this dispute was abandoned. There was no longer any controversy as to the date when the buildings were erected, and the Corporation made a plain admission that they were all built before the 1st June, 1863. If the High Court had incorporated this admission into the actual form of their decree, instead of referring to it in the reasons which they gave, their judgment would have been correct in form, as it was, in their Lordships' opinion, correct in substance, and the appellants would have had no ground for complaint. This, however, they omitted to do, and though the matter is in one sense a matter of technicality, yet, upon the whole, their Lordships think that the appellants are right in saying that the decree ought to be amended in this particular.

The Corporation have really raised no objection to this step being taken, but complain that this was not the substance of this appeal and did not form the real substance of the original suit. This matter their Lordships have taken into consideration in dealing with the costs of the proceedings; and the order which they will humbly advise His Majesty to make will be that the decree of the High Court be amended by introducing an admission on the part of the Corporation that all the structures affected were erected before the 1st June, 1863, and that the appellants are entitled to be

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paid reasonable compensation by the Corporation for the loss which the appellants would suffer, if and when, such structures are compulsorily removed by the Corporation, and that so amended it be confirmed.

The Corporation will pay the appellants' costs of the action upon the footing that the only relief this action asked was that contained in clauses (A) and (B) of the prayer in the plaint.

The appellants will be ordered to pay the respondents' costs of all the other issues in the suit. Those costs will be set off *pro tanto* one against the other. The order of the Court of appeal as to costs will remain and no costs will be allowed of this appeal.

J. M. P.

*Appeal allowed in part.*

*Watkins & Hunter*:—Solicitors for the Appellants.

*Orr, Dignam & Co.*—Solicitors for the Respondents.

PRESENT:—*Lord Shaw, Lord Parmoor and Mr. Ameer Ali.*

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AHMAD RAZA AND OTHERS

v.

SAIYID ABID HUSAIN AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE  
NORTH-WESTERN PROVINCES, ALLAHABAD.]

*Stamps—Bengal Regulation X of 1839, Secs. 3, 17 and Sch. A, Arts. 3, 20—Lost deed alleged to be insufficiently stamped—Presumption that documents accepted by Court are properly stamped—Mortgages in India before the Transfer of Property Act (IV of 1882)—No writing required.*

In a suit for redemption of an usufructuary mortgage dated 1857, the document on which the plaintiff relied to establish the mortgage was a certified copy of a petition of compromise filed in Court in that year. The suit was based on the recital in the petition relating to the mortgage and the certified copy in question bearing a 1 rupee stamp was issued in 1857. The record of the proceedings in which the petition was filed was destroyed in the mutiny. The defendants objected that the contract was not enforceable, inasmuch as the document was not properly stamped :

*Held*, that before the Transfer of Property Act came into force, such mortgages could be created without any writing outside the Presidency towns by simple delivery of possession; that the said petition recited the terms on which the then

dispute was settled among them being the agreement relating to the usufructuary mortgage; that the mortgage was verbal and was valid and the present suit was not based on an agreement contained in the petition; that if the petition was treated as the document creating the mortgage, it must be presumed that the officer before whom it was presented satisfied himself that it was properly stamped and no inference that it was not so stamped could be derived from the fact that the copy bears a 1 rupee stamp.

Appeal from a decree of the Allahabad High Court (August 4, 1913) reversing in second appeal a decree of the District Judge of Azamgarh (May 28, 1912) and restoring a decree of the Subordinate Judge of that district (March 29, 1912.)

The facts of the case are sufficiently stated in their Lordships' judgment. The only question was whether, assuming that the petition of compromise therein mentioned created the mortgage sued on, it was properly stamped in accordance with Bengal Regulation X of 1829, the stamp law then in force. The District Court found that it was not: the High Court held that it was. Hence this appeal.

*Raikes*, for the Appellant: The High Court had no power to interfere in second appeal with the District Judge's finding of fact, and the District Judge is right and the High Court wrong on the question of law.

Respondents based their claim on a lost document of which they had a copy. The question arose whether secondary evidence of the lost document could be given without proving that it was duly stamped. If the original is not stamped, a penalty can be paid and the document stamped. But if the original is lost, a copy cannot be stamped; the Act does not provide for payment of the penalty on a copy, but only on original; *Rajah of Bobbili v. Inuganti China Sitarasami Garu* (1).

[Lord Shaw: The document was filed in Court in 1857. Do you ask us to assume it was not properly stamped at the time?]

Yes, for the reason that such application is not stamped at all when there is a consent decree on a compromise. There is nothing to show that the Court gave a consent decree. The document then bore a rupee stamp which was insufficient. In substance the plaintiffs are not suing to redeem the mortgage, but on the agreement set out in the petition.

[Lord Shaw: they could have made an oral agreement].

They do not say they did; as to sufficiency of stamp, *vide* Bengal Regulations X of 1829, sections 3 (Stamp) and 17

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(Court-Fees). If the document is an agreement, it comes under Sch. (a) Art. 3. The copy bears the same stamp as the original : Sch. (a) Art. 20.

The facts in *Ram Dayal v. Dhoobey Jhunnan Lal* (1), are different from those in the present case.

*De Gruyther, K. C.*, and *Sir W. Garth* for the Respondents were not called upon.

Their Lordships' judgment was delivered by

July, 21,

**Mr. Ameer Ali** :—This appeal from a judgment and decree of the High Court of Allahabad arises out of a suit brought by the plaintiffs in the Court of the Subordinate Judge of Azamgarh, for the redemption of an usufructuary mortgage alleged to have been created in 1857 in respect of a twelve annas share in the village of Malgaon. The document on which they rely to establish the mortgage is a certified copy of a petition of compromise filed in Court on the 1st of April, 1857. It is not disputed that the record of the proceedings in which this petition was filed, was destroyed in the Mutiny, which broke out shortly after. The certified copy is, however, admissible in evidence relative to the facts recited therein, and was rightly admitted by the Subordinate Judge. The question for determination in this appeal is, however, whether if the petition is to be treated as creating the mortgage, it was properly stamped in accordance with the Indian Statute then in force to entitle the plaintiffs to sue upon it.

The facts which led to its being filed in Court are simple. A suit had been brought by the plaintiffs' ancestors against the predecessors of the defendants for a decree for possession "by partition" of the twelve annas share in Mowzah Malgaon to which they claimed to be entitled. Their claim appears to have been dismissed by the first Court. The appeal from this dismissal of their suit, preferred by the plaintiffs, was pending before the Zillah Judge. The parties, however, came to a compromise, and, as stated already, on the 1st April, 1857, filed before that officer the petition in question, signed by the pleaders of the parties. In this petition they notified to the Court the terms of the settlement, and prayed that the case might be decided according to the conditions set forth above. These "conditions" are stated in the body of the petition in the following terms :—

"Now the parties have come to a settlement in this way, that we, the respondents, admit the ownership of the appellants, and that the

claim has been brought within time ; that the respondents shall remain in possession of the aforesaid property for a period of twelve years in lieu of the mortgage money ; that the appellants shall redeem the aforesaid property after twelve years, on payment of the mortgage money out of their own pocket."

The order endorsed on the document is as follows :—

"To-day the pleaders for the parties filed this compromise in the presence of their respective clients, and verified and admitted all the conditions laid down therein. It is, therefore, ordered that the compromise be placed on the record, and the case be put up to-morrow in the forenoon for final disposal."

And then follows the date (1st April, 1857), and the Judge's signature in English.

On the 28th April, 1857, the certified copy now filed was issued to the pleader acting for the predecessors of the plaintiffs.

The present suit is based on the recital in the petition relating to the mortgage. The defendants, among other pleas, raised the objection that the contract was not enforceable, inasmuch as the document was not properly stamped. The Subordinate Judge overruled this objection, and holding in favour of the plaintiffs on the other points decreed their claim. The District Judge on the appeal of the defendants came to a different conclusion. He was of opinion that "the original deed of compromise" bore only a stamp of 1 rupee, and he went on to say :—

"If the original had borne a stamp of 10 rupees the stamp on the copy would also have been one of 10 rupees, as required by article 20 of Schedule (A) of the Regulation. I hold that the original compromise bore a stamp of 1 rupee only ; that the document required a stamp of 10 rupees ; and that as the document was insufficiently stamped its copy is not admissible in evidence."

He accordingly reversed the decision of the Subordinate Judge and dismissed the suit. The plaintiffs thereupon appealed to the High Court of Allahabad, which set aside the decree of the District Judge and restored that of the first Court.

The defendants have appealed to His Majesty in Council, and their main contentions against the judgment and decree of the High Court are the same that found acceptance before the District Judge.

In their Lordships' opinion there are two short answers to the defendants' objections. It is not disputed that before the Indian Transfer of Property Act (IV of 1882) came into force, such

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mortgages could be created without any writing, outside the Presidency towns by simple delivery of possession. The petition by which the compromise was notified to the Court recites the terms on which the dispute was settled, among them being the agreement relating to the usufructuary mortgage. The mortgage was made verbally, and was valid according to the law then in force; it was notified to the Court as a part of the settlement. The present suit is not based on any agreement contained in the petition; it is based on a contract made outside and recited in it to enable the Court to make a decree in accordance with the settlement. If the Zillah Judge passed a formal order, as he proposed to do, embodying in his decree the terms of the settlement, and there is no reason to suppose that he did not, the present objection must necessarily fall to the ground. But whether he did or did not, the present suit, based on the agreement made independently of and before the petition was filed in Court, would be clearly maintainable.

Again, if the petition is to be treated as the document creating the mortgage, it may be rightly presumed that the officer before whom it was presented satisfied himself that it was properly stamped. No inference can be derived from the fact that the copy bears a 1 rupee stamp. Under the Court Fees Act (VII of 1870) it is the proper stamp for issuing a copy of the proceeding in the Zillah Court; and as a copy of the petition and the order thereon, it bears the right court-fee stamp of 1 rupee. The District Judge clearly fell into an error in taking the stamp on the certified copy as an indication of the stamp on the petition itself.

Their Lordships concur generally with the reasons given by the learned Judges of the High Court for overruling the decision of the District Judge, and they are of opinion that this appeal should be dismissed with costs.

And they will humbly advise His Majesty accordingly.

*T. L. Wilson & Co.* :—Solicitors for the Appellants.

*Watkins & Hunter* :—Solicitors for the Respondents.

J. M. P.

*Appeal dismissed.*

PRESENT :—*Lord Shaw, Lord Parmoor, and Mr. Ameer Ali.*

NOBIN CHANDRA BARUA AND OTHERS

v.

CHANDRA MADHAB BARUA.

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June 14.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT  
WILLIAM IN BENGAL.]

*Account, suit for—Principal and agent—Proprietor appointed by a co-proprietor as common manager for payment of debts on the estate, whether an agent of the latter and, on his death, of his sons—Limitation—Indian Limitation Act, (XV of 1877), Sec. 8 and Sch. II, Art. 89—Demand—Discharge and minority of some of the claimants to an account.*

In 1894 one N. M. a part proprietor of an estate, entered into an agreement with his co-proprietor the respondent under which the latter was appointed agent for the purpose of collecting rents and profits from the estate, in order gradually to pay off a heavy debt, rendering accounts of his management to N. M., who died in July 1899 leaving three sons, two of whom were minors. For about two years after the death of N. M., the respondent continued to manage the estate as before. The agency was terminated by a notice dated the 16th January 1902. In September 1904 the three sons sued the respondent claiming an account for the whole period of the agency. The Subordinate Judge ordered an account from Sraban 1303 B. S. to Magh 1308, B. S. (July-August 1896 to 16th January 1902), but the High Court on respondent's appeal limited the account to five months, Bhadra to Magh 1308 B. S. :

*Held*, that in the absence of any cross appeal to the High Court or of any memorandum such as is required to be filed under section 561 of the Code of Civil Procedure, 1892, it was not competent for the plaintiff to get in this appeal any further remedy than the restoration of the order of the Subordinate Judge, and, that, having regard to the fact that it was not contended that after the death of N. M. the position of the respondent was altered or that he became trustee in place of an agent, Art. 89 of Sch. II of the Indian Limitation Act, applied and the order of the Subordinate Judge should be restored.

*Held*, also, that inasmuch as the two plaintiffs who were minors did not come of age until after suit and the appellant who was of age was not capable of giving a discharge which would bind the two minors, section 8 of the Indian Limitation Act 1877, did not apply.

The High Court acting on paragraph 3 of the plaint held, that from its language the Court must suppose that demands were going on as long as the business was in existence, although the dates of the demands were not given or proved :

*Held*, that there was nothing in the pleading which would justify the inference which the High Court had drawn, and in the absence of evidence no such inference could probably be drawn adversely to the claim of the plaintiffs.

*Chandra Madhab Barua v. Nobin Chandra Barua* (1), partly affirmed and partly reversed.

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Nobin Chandra  
v.  
Chandra Madhab.

Appeal from a decree of the Calcutta High Court (June 11, 1912), modifying a decree of the Subordinate Judge of Goalpara (May 21, 1910).

The main question in this appeal was whether appellant's claim against respondent for rendition of accounts was barred by limitation. The facts are sufficiently stated in their Lordships' judgment. Nanda Kumar Barua, father of appellant, had entered into an agreement with respondent whereby the latter was to collect the rents and profits of a certain forest mahal and to discharge debts due from appellant's father out of the collections.

Paragraph 3 of the plaint was as follows :—

"That from the aforesaid 1293 B. S. to the end of 1308 B. S., the defendant kept the said forest (timber) mahals under his entire management and superintendence and made collections on behalf of the said Nanda Kumar Barua, father of the plaintiffs, while he was alive, and on his death, on behalf of the plaintiffs and made the collections of the profits of the said Sayerat mahal in the 16 anna share till the end of the year 1308, yet, without rendering any account of the said moneys realised, to the plaintiff's father while he was alive, or on his death, to the plaintiffs in spite of repeated demands. The plaintiffs served a notice dated the 3rd of Magh 1308 B. S. containing some false allegations, upon the defendants but he never rendered any accounts nor paid the just dues as per account to the plaintiffs and their predecessor."

Plaintiffs claimed accounts for 16 years (1293 B. S. to 1308 B. S.). Respondents pleaded that he had rendered accounts up to the death of plaintiff's father; also limitation. The Subordinate Judge found (1) that the respondent had managed the forest land from 188; to January 1902, (2) that he had rendered no accounts, (3) that Nanda Kumar Barua had demanded accounts in April 1891 but that respondent refused to furnish them, (4) that respondent was plaintiffs' agent and that article 89 of the Indian Limitation Act, 1877 applied, and (5) that respondent was liable to render an account from July 1896 to January 1902. He accordingly decreed the claim to that extent.

The defendant appealed to the High Court, which delivered judgment (1), (Stephen and Richardson JJ.) disallowing the claim for all but a few months. The plaintiff thereupon appealed to His Majesty in Council.

*Sir W. Garth*, for the Appellants, submitted that upon the evidence it was established that throughout the respondent's

management accounts were never demanded and refused within the meaning of article 89 of the Indian Limitation Act. The demand must be specified and absolute, and so also must be the refusal to furnish accounts. Respondent's case was, not that he had ever refused to render accounts, but that he had in fact furnished accounts up to the death of appellant's father. That case had been found by the Courts below to be false. Respondent gave no evidence of refusal and demand. The High Court had based their judgment upon statements in the plaint, but these statements did not warrant the inference drawn from them. There was no demand and refusal proved, either in Nanda Kumar's lifetime or after his death. Pleadings in Indian cases are not to be strictly construed: *Musammatt Anundamoyee v. Sheeb Chunder Roy* (1); *Madho Pershad v. Gajadhar* (2). In any case, plaintiffs appellants 2 and 3 were admittedly minors at Nanda Kumar's death and disabled to give a discharge till after the suit was instituted: section 8 of the Limitation Act 1877, applies. Plaintiffs are entitled to an account for the whole 16 years.

*L. De Gruyther, K. C.*, and *B. Dube* for Respondents: Plaintiffs did not appeal from the decree of the Subordinate Judge dismissing a part of their claim; the present appeal so far as it goes beyond his decree is not maintainable. The High Court has rightly held on the evidence that a demand and refusal within the meaning of article 89 of the Limitation Act is proved. The first plaintiff was practically the managing member of the family and could have given a valid discharge; section 8 therefore does not apply: *Sreemutty Soorjee Money Dossee v. Denobondoo Mullick* (3); *Kishen Pershad v. Harnarain Singh* (4); *Sheo Shankar Ram v. Jaddo Kunwar* (5) referred to. These cases were under the Mitakshara, but the same principle applies in the Dayabhaga School. In any case the major plaintiff was entitled to demand his share, and the suit is barred so far as his share is concerned.

*Sir W. Garth* replied.

Their Lordships' judgment was delivered by

**Lord Parmoor**:—The appellants' father, Nanda Kumar Barua, was the owner of one moiety and his uncles, the respondent and Chandicharan Barua, were the owners of the other moiety of a lakhraj estate in the district of Goalpara comprising a large tract

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(1) (1862) 9 M. I. A. 287 (301).

(2) (1884) L. R. 11 I. A. 186 (192); I. L. R. 11 Calc 111.

(3) (1857) 6 M. I. A. 526 (539).

(4) (1910) L. R. 38 I. A. 45; 13 C. L. J. 345; I. L. R. 33 All. 272.

(5) (1914) L. R. 41 I. A. 216; 20 C. L. J. 282; I. L. R. 36 All. 383.

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*Lord Parmoor.*

of forest land. In or about the year 1894 Nanda Kumar Barua entered into an agreement with the respondent under which the respondent was appointed agent for the purpose of collecting rents and profits from the forest land, in order gradually to pay off a heavy debt, rendering accounts of his management, from time to time, to Nanda Kumar Barua. Nanda Kumar Barua died in July 1899. He left three sons, the appellants, two of whom were minors. For about two years after the death of the appellants' father, the respondent managed the property on the same terms as before. The agency was terminated by a notice dated the 16th January, 1902. In September 1904 the appellants commenced a suit against the respondent claiming a declaration that the respondent was liable to render accounts to the plaintiffs of the amount realised in respect of the said property for the whole period of the agency. The Subordinate Judge ordered an account of the income and expenditure in regard to the Forest (Timber) Mahal, belonging jointly to both parties, from the month of Sraban 1303 B. S., to the month of Magh 1308 B. S. Against this order the respondent appealed to the High Court. The appeal was allowed and the order of the Subordinate Judge was varied so as to limit the account to five months from Bhadra to Magh 1308. It is against this order that the appeal is brought.

During the course of the argument, the counsel for the appellants asked that accounts should be ordered for the whole period of the agency, but in the absence of any cross appeal to the High Court, or of any memorandum such as is required to be filed under section 561 of the Code of Civil Procedure Act, 1882, it is not competent for the appellants to get any further remedy than the restoration of the order of the Subordinate Judge. It is unnecessary to consider the argument addressed to their Lordships as to any liability to account from an earlier date. The question on appeal is limited to the consideration whether the order of the Subordinate Judge should be restored.

It was not argued before their Lordships that, after the death of Nanda Kumar Barua in Sraban 1306, the position of the respondent was altered or that he became a trustee in place of an agent. Consequently article 89 of the Limitation Act, 1877, applies, and the only point for decision is whether the provisions contained in this article protect the respondent against a liability to render accounts from the month of Sraban 1303 B.S. and limit his liability to render accounts from Bhadra 1308. In their Lordships' opinion the order of the Subordinate Judge should be restored.

In section 89 of the Limitation Act, the period of limitation is three years from the date when the account is demanded and refused, or from the conclusion of the agency. It appears doubtful how far there had been any demand and refusal during the lifetime of Nanda Kumar Barua, but in any case at the date of his death his representatives would have been entitled to demand an account for a period of three years. There is no evidence of any kind that a demand and refusal of accounts were made by or on behalf of the appellants after the death of Nanda Kumar Barua.

The learned Judges of the High Court appear to have acted on a statement in the plaint of the appellants. They hold that from the language of the pleading they must suppose that demands were going on as long as the business was in existence, although the dates of the demands are not given or proved. Their Lordships cannot find in the plaint any statement which would justify the inference which the learned judges have drawn, and in the absence of evidence are of opinion that no such inference can properly be drawn adversely to the claim of the appellants. The statement of objections on the part of the respondent does not allege that there has been any demand and refusal of accounts after the death of Nanda Kumar Barua. The evidence of the respondent is inconsistent with any such case, since he states that he had settled the accounts with Nanda Kumar and with the appellants in 1306 and 1307. This evidence is not believed by the Subordinate Judge. He finds that during the period of the management the respondent has furnished no accounts and has not, by any act of Nanda Kumar or his heirs, been exempted from the duty of furnishing accounts.

A subordinate question was raised on section 8 of the Limitation Act. The answer is that the two appellants who were minors did not come of age until a month or two before the case was heard by the Subordinate Judge, and that the appellant who was of age, Nobin Chandra, was not capable of giving a discharge which would bind the two minors.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and that the order of the Subordinate Judge should be restored with costs here and below.

*T. L. Wilson & Co* :—Solicitors for the Appellants.

*Barrow, Rogers & Nevill* :—Solicitors for the Respondent.

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—

# CIVIL RULE.

*Before Sir Asutosh Mookerjee, Knight, Judge, and  
Mr. Justice Cuming.*

BEPIN BEHARI MAJUMDAR AND OTHERS

v.

JOGENDRA CHANDRA GHOSH AND OTHERS. \*

*Suit, stay of—Civil Procedure Code (Act V of 1908), Sec. 10—‘Matter in issue’  
—Suit for rent—Proceedings on appeal.*

Section 10 of the Code of Civil Procedure does not bar the trial of a suit for rent for a period subsequent to that included in the previously instituted suit for rent.

The expression ‘matter in issue’ in section 10 of the Code of Civil Procedure has reference to the entire subject in controversy between the parties.

The object of section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue.

Proceedings on appeal are for many purposes deemed only a continuation of the suit instituted in the first Court.

*Chinna Karuppan v. Meyyappa* (1) referred to.

Application by the Defendants.

Application for stay of a rent suit pending appeal.

The material facts and arguments appear from the judgment.

*Babus Jadu Nath Kanjilal and Sachindra Prosad Ghosh* for the Petitioners.

*Babus Mohendra Nath Ray, Bepin Behary Ghosh, Biraj Mohan Mojumdar and Anilendra Nath Roy Chowdhury* for the Opposite Party.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee J.:**—We are invited in this Rule to direct under Sec. 10 of the Civil Procedure Code, 1908, that a suit for rent in the Court of the Subordinate Judge of Khulna be stayed during the pendency of an appeal in this Court. The petitioners were defendants in a suit for rent instituted against them by the opposite party on the 6th May, 1911, in the Court of the Subordinate Judge of Khulna for settlement of fair rent and for recovery of arrears of the years 1314-17 B. S. The claim was resisted on various grounds

\* Civil Rule No. 668 of 1916 in the matter of application from Original Decree No. 267 of 1914 and Rent Suit No. 9 of 1916 in the Court of the Subordinate Judge of Khulna.

(1) (1915) 18 M. L. T. 400; M. W. N. 844.

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amongst which we may mention one, namely, that the plaintiffs had evicted the defendants from the lands of mouza Ula claimed by the defendants as included in their tenure. The plaintiffs did not admit that mouza Ula was so included and apparently maintained that they themselves were lawfully in possession of those lands. The Subordinate Judge tried the suit on evidence, overruled the plea of suspension of rent by reason of eviction, and made a modified decree in favour of the plaintiffs, as in his opinion the defendants were equitably entitled to certain deductions. The Subordinate Judge however stated at the conclusion of his judgment that the decision with respect to Ula will not be binding as between the parties, and the question whether Ula appertains to the tenure of the defendants or not was left open as between them. This declaration was incorporated in the decree made on the 23rd April, 1914. On the 9th June, 1914, the defendants lodged an appeal in this Court against the decree and took as one of the grounds of objection in the memorandum of appeal that the decision as to the title to Ula was contrary to the evidence on the record. The appeal has not yet been heard. Meanwhile the opposite party have on the 12th April, 1915, instituted a suit in the Court of the Subordinate Judge of Khulna for recovery of the arrears of the years 1318-21. The defendants resist the claim on the ground amongst others that during the years in suit they had been unlawfully kept out of the lands of village Ula. There can be no question that the title to Ula arises in the present as in the previous suit, and as the question was not conclusively determined in the previous suit, it must be investigated on fresh materials in the present proceeding. The defendants contend on these facts that the second suit must be stayed under section 10.

Section 10 is in these terms : "No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the Governor-General in Council and having like jurisdiction, or before His Majesty in Council."

It is plain that if section 10 is otherwise applicable, its operation is not excluded by the fact that the previously instituted suit has reached the stage of an appeal. This is clear from the use of the expression "Before His Majesty in Council," and this view was

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expressly adopted in the case of *Chinna Karupan v. Meyyappa* (1), where it was pointed out that proceedings on appeal are for many purposes deemed only a continuation of the suit instituted in the first Court : *Pichuvayyengar v. Seshayyengar* (2) ; *Kristnama v. Mangammal* (3). Consequently the mere fact that the decree in the previously instituted suit is under appeal in this Court, does not enable the plaintiffs to invite us to hold that section 10 is inapplicable. The question, accordingly, reduces to this ; is the matter in issue in the subsequently instituted suit for rent also directly and substantially in issue in the previously instituted suit. The suits are between the same parties litigating under the same title and that requirement of the Code is fulfilled. What then is the meaning of the expression "*the matter in issue.*" The defendants invite us to hold that the expression is equivalent to "any of the questions in issue." The obvious answer is that if that had been the intention of the framers of the section, appropriate words might have been used to bring out such sense. We are of opinion that the expression "the matter in issue" has reference to the entire subject in controversy between the parties. The object of the section is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the *same* matter in issue. To take one illustration, if a mortgage security includes properties in three districts, there would be nothing to prevent a litigious plaintiff from indulging in the luxury of three suits instituted simultaneously in three different Courts for the same relief, namely, a decree for sale on the basis of his mortgage. Section 10 effectively bars this possibility. Similarly, it debars the plaintiff from seeking to carry on simultaneously two suits for recovery of the same sum of money, as was attempted unsuccessfully in the case of *Mahadeo Prasad v. Gajadhar Prasad* (4). But the section does not go further and does not bar the trial of a suit for rent for a period subsequent to that included in the previously instituted suit for rent ; the matters in issue, that is, the subject matters in controversy are obviously different in the two suits. In the first suit, the matter in controversy is, whether A is entitled to recover from B, Rs. 5,000 as rent for the year X. In the second suit, the question in dispute is whether A is entitled to recover from B, Rs. 3,000 as rent for the year Y. We are unable to hold that merely because the same question may be involved in the two suits, the matters in issue are identical, so as to attract

(1) (1915) 18 M. L. T. 400 ; M. W. N. 844.

(2) (1892) I. L. R. 18 Mad. 214 ; 5 M. L. J. 39.

(3) (1902) I. L. R. 26 Mad. 91.

(4) (1912) 16 C. W. N. 897.

the operation of section 10. If the contention of the defendants were to prevail, successive suits for rent or for other sums periodically due, would be perpetually tied up. It is further important to note that this result would follow even if, as has happened in the present case, the decision in the previously instituted suit upon a particular point has been left open, for Sec. 10, according to the defendants, does not require that the point should have been conclusively determined. It is finally worthy of note that Sec. 10 when applicable leaves no discretion to the Court and must consequently be applied only to cases clearly within its language and intendment. We are of opinion for the reasons assigned that section 10 has no application to the present case.

The Rule is discharged with costs. We assess the hearing-fee at three gold mohurs.

A. T. M.

*Rule discharged.*

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*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.*

CHANDRA KANT BHATTACHARYYA AND OTHERS

v.

LAKSHMAN CHANDRA CHAKRABARTI AND OTHERS.

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*Review—Non-appealing party, if can apply—Appeal to lower appellate Court—Second appeal by some of the parties—Civil Procedure Code (Act V of 1908), O. 47, R. 2—“Where the ground of such appeal and the review are based on the same grounds”—Decree of the appellate Court, effect of—Appeal by some of the parties, effect of.*

The plaintiffs instituted a suit for recovery of possession of land against five defendants, who claimed to hold it under one title. The suit was decreed. An appeal preferred by all the defendants was dismissed. Three of the defendants (*i. e.* the defendants other than the first two) then preferred a second appeal and made respondents the plaintiffs and also the defendants who had not joined them in the appeal. The appeal was summarily dismissed under O. 41 R. 11 of the Code of Civil Procedure :

Held, that an application for review on the ground of discovery of new and important evidence by the first two defendants, who did not prefer a second appeal, was entertainable by the lower appellate Court.

\* Civil Rule No. 669 of 1914, against an order of Babu Debendra Nath Pal, Subordinate Judge of Jessore, dated the 23rd March, 1914.

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A defendant, who has not himself appealed, may apply for a review of judgment, notwithstanding the pendency of an appeal by a co-defendant, except in two contingencies, namely, *first*, where the ground for review is identical with the ground for appeal, and, *secondly*, when, as respondent in the appeal, he can present to the appellate Court the case on which he seeks review. Where the grounds on which the appeal was preferred, were different from the ground on which the review is sought, namely, the discovery of new and important matter or evidence, the case does not fall within the exception.

The expression "where the ground of such appeal is common to the applicant and the appellant" in order 47 rule 1 (2) of the Code of Civil Procedure, refers to a case where the appeal and the review are based on the same grounds, and does not contemplate a comparison between the actual appeal by the defendant and a possible hypothetical appeal by the applicant for review.

If the decree of the lower Court is reversed by the appellate Court, it is absolutely dead and gone ; if, on the other hand, it is affirmed by the appellate Court, it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place for all intents and purposes ; both the decrees cannot exist simultaneously. The fact that an appeal has been dismissed under order 41 rule 11 of the Code of Civil Procedure, makes no difference in principle.

*Ram Charan v. Lakshikanta* (1) followed.

The effect of an appeal by some alone of the parties affected by a decree, is to leave untouched the decree as between the parties thereto.

Application for revision by the Plaintiffs.

Suit for recovery of possession of land.

The material facts and arguments appear from the judgment.

*Babu Brojo Lal Chuckerbutty* for the Petitioners.

*Babus Sarat Chunder Roy Chowdhry, Satya Charan Sinha and Panchanan Ghosh (for Babu Hara Prosad Chatterjee)* for the Opposite Party.

C. A. V.

The judgment of the Court was delivered by

July, 19.

**Mookerjee J.**—We are invited in this Rule to determine, whether the Court of appeal below had jurisdiction to entertain an application for review of a judgment passed by it. The circumstances which led to the application are not in controversy, and may be briefly recited. On the 17th June, 1911, the plaintiffs instituted a suit for recovery of possession of land against five defendants, who claimed to hold it under one title. The trial Court found in favour of the plaintiffs and decreed the suit. The five defendants appealed to the District Judge on the 8th July, 1912. The appeal was heard by the Subordinate Judge and was dismissed on the 23rd May, 1913. Three of the defendants (*i.e.*, the defendants other than the first two) then preferred a second appeal to

this Court on the 1st September, 1913, and made respondents the plaintiffs as also the defendants who had not joined them in the appeal. The appeal was summarily dismissed by this Court on the 5th December, 1913, under order 41 rule 11, Civil Procedure Code. The five defendants, then applied to the Subordinate Judge on the 18th December, 1913, to review his judgment on the ground of discovery of new and important evidence which, after the exercise of due diligence, was not within their knowledge and could not be produced by them at the time when the appeal was heard. The Subordinate Judge took evidence in support of the application, and ultimately granted the review on the 23rd March, 1914. The plaintiffs thereupon obtained this Rule on the 15th June, 1914, on the ground that after the second appeal had been dismissed by this Court, the Subordinate Judge had no jurisdiction to entertain the application for review. In our opinion, this contention is well-founded in respect of the three defendants who had appealed to this Court, but must be overruled as regards the other two defendants.

Order 47, Rule 1 (1) of the Civil Procedure Code 1908, provides that any person, considering himself aggrieved by a decree from which an appeal is allowed but from which no appeal has been preferred, may apply for a review of judgment to the Court which passed the decree. The plaintiffs contend that in this case an appeal was preferred, within the meaning of this rule, from the decree of the Subordinate Judge to this Court, and, consequently, the Subordinate Judge was not competent, after the dismissal of that appeal, to entertain an application for review. This argument is well founded in so far as the three defendants who had unsuccessfully appealed to this Court, are concerned. But the two defendants, who had not joined in the appeal and applied for review, contend that as the appeal was preferred, not by them but by the other defendants, the rule does not bar their application. In support of this view, they rely upon the decision in *Bunkoo Lal v. Basoomunissa* (1) which turned upon the construction of section 376 of Act VIII of 1859; that section permitted an application for review by a person considering himself aggrieved by a decree from which no appeal had been preferred to a superior Court. Norman and Seton Karr, JJ. construed this to mean a decree from which no appeal has been preferred by the applicant himself. This is obviously a reasonable construction, and, in our opinion, order 47 rule 1 (1) (a) should be interpreted in the same manner.

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There is this difference, however, between the Codes of 1859 and 1908, that in the Code of 1859 there was no provision similar to what is now embodied in order 47, rule 1 (2). That sub-rule is in these terms : "A party who is not appealing from a decree or order may apply for a review of judgment, notwithstanding the pendency of an appeal by some other party, except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review." This provision was first introduced by the Legislature in section 623 of the Civil Procedure Code of 1877 ; its obvious effect is to restrict the right which would otherwise be possessed by one defendant to apply for review of judgment, notwithstanding an appeal by a co-defendant. The position now is that a defendant, who has not himself appealed, may apply for a review of judgment, notwithstanding the pendency of an appeal by a co-defendant, except in two contingencies, namely, *first*, where the ground for review is identical with the ground for appeal, and, *secondly*, when, as respondent in the appeal, he can present to the appellate Court the case on which he seeks review. It is plain that the expression "where the ground of such appeal is common to the applicant and the appellant" refers to a case where the appeal and the review are based on the same grounds, and does not contemplate a comparison between the actual appeal by the defendant and a possible hypothetical appeal by the applicant for review. There is, in our opinion, no implied reference in order 47 rule 1 (2) to order 41 rule 4. In the case before us, the grounds on which the appeal was preferred, were different from the ground on which the review is sought, namely, the discovery of new and important matter or evidence. Consequently, the case does not fall within the exception ; the grounds for the appeal and the review are distinct and the petitioners for review could not possibly present their case to the appellate Court as respondents, as the appeal was summarily dismissed. The Court below should, in our judgment, have dismissed the application for review in so far as review was sought by the three defendants who had appealed to this Court, but the Subordinate Judge was competent to entertain and did properly entertain the application in so far as the other two defendants were concerned.

The question next arises, whether, on the application for review, made by those two defendants, the entire decree could be set aside. The answer depends upon the determination of the effect of the dismissal of the second appeal preferred to this Court

by three of the defendants. The plaintiffs contend that the effect of the dismissal of the appeal was to supersede the decree of the Subordinate Judge as between the plaintiffs and the defendants appellants, and to substitute therefor the decree of dismissal made by this Court, with the inevitable result that the Subordinate Judge could not, after the dismissal of the appeal by this Court, re-open the matter in controversy between those defendants and the plaintiffs. We are of opinion that this argument is well founded. The effect of the disposal of an appeal upon the decree of the primary Court was lucidly stated by Mr. Justice Dwarkanath Mitter in *Ramcharan v. Lakshikanta* (1). "If the decree of the lower Court is reversed by the appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the appellate Court, it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place for all intents and purposes; both the decrees cannot exist simultaneously." This is in accord with the view expounded by Scotland, C. J. in *Aruna'hella v. Velu Dayan* (2), and was subsequently adopted by the majority of the Full Bench in *Muhammad Sulaiman v. Muhammad Yar* (3) where the observations of the Judicial Committee in *Krishnakinkar v. Barada Kanta* (4) were explained. This principle has been repeatedly applied to determine the Court which can entertain an application for amendment of a decree, after an appeal from that decree has been dismissed: *Sri-gobind v. Gangatri* (5); *Kumar Rameswar v. Bhabasundari* (6); *Aghorakumar v. Mahomed* (7). It is also plain that the fact that an appeal has been dismissed under section 551 of the Code of 1882 or under O. 41 R. 11 of the Code of 1903 makes no difference in principle, for the dismissal operates as a decree and supersedes the decree of the Court below, precisely in the same way as a decree of dismissal made after service of notice to the respondent: *Uma-sundari v. Bindhubasini* (8); *Abbas v. Nibarani* (9); *Munisami v. Munisami* (10); *Asma Bibi v. Ahmad Hussain* (11). On this ground, it was ruled in *Pearymohan v. Mahendranath* (12) and *Ramappa v. Bharma* (13), that when an appeal has been dismissed

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(1) (1871) 7 B. L. R. 704 (714) F. B. (2) (1870) 5 Mad. H. C. R. 215.

(3) (1888) I. L. R. 11 All. 267 F. B. (4) (1872) 14 M. I. A. 465.

(5) (1907) 6 C. L. J. 542. (6) (1909) 11 C. L. J. 81.

(7) (1909) 11 C. L. J. 155. (8) (1897) I. L. R. 24 Calc. 759.

(9) (1910) 11 C. L. J. 159. (10) (1898) I. L. R. 22 Mad. 293.

(11) (1908) I. L. R. 30 All. 290. (12) (1906) 4 C. L. J. 566.

(13) (1906) I. L. R. 30 Bom. 625.

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under section 551 of the Code of 1882, the Court which made the decree appealed against has no jurisdiction to review its judgment or decree which had already become merged in the decree of dismissal of the appellate Court. This view is substantially in accord with that adopted under the Code of 1859 in the cases of *Lucas v. Stephen* (1); *Oomanund v. Suttish* (2); *Rajdharee v. Mohadeo* (3); *Bhyrrib v. Kally* (4); *Brojonath v. Jamirunnessa* (5); *Parasuram v. Kristnaiyar* (6), though the true principle appears to have been overlooked in *Ex parte Bashiyagarulu* (7). It follows accordingly that when, on the 5th December, 1913, the appeal of the defendants, other than the first two, was summarily dismissed under O. 41 R. 11, the decree of the Subordinate Judge, in so far as it determined the controversy between the plaintiffs and these defendants, became merged in the decree of this Court and thus ceased to be reviewable by the Subordinate Judge. It is equally plain that the decree of the Subordinate Judge, in so far as it embodied a determination of the controversy between the first two defendants and the plaintiffs, remained unaffected by the result of the appeal and continued to be reviewable by the Subordinate Judge. It is immaterial that order 41 rule 4 authorised this Court, upon an appeal by some alone of the defendants, to make an order for reversal of the entire decree, and, thus, under order 41 rule 33, to confer a benefit even upon parties who had not filed the appeal; but this Court could not, in the appeal by some of the defendants, make an order to the detriment of the others, not, at any rate, till they had been afforded an opportunity to be heard. We may observe that there is nothing unusual in the result that the effect of an appeal by some alone of the parties affected by a decree is to leave untouched the decree as between other parties thereto; this is illustrated by the class of cases reviewed in *Loke Nath v. Gaju Singh* (8), where the question arose with reference to the period of limitation applicable when a decree has been assailed by way of appeal at the instance of some alone of the parties affected thereby. We are clearly of opinion that the application for review could be entertained only in respect of the decree as between the first two defendants and the plaintiffs. The order of the Subordinate Judge, however, erroneously sets aside the entire decree and restores the whole appeal for re-hearing.

(1) (1868) 9 W. R. 301.

(3) (1869) 11 W. R. 511.

(5) (1867) 7 W. R. 218.

(7) (1863) 1 Mad. H. C. R. 254.

(2) (1868) 9 W. R. 471.

, (4) (1871) 16 W. R. 112.

(6) (1870) 5 Mad. H. C. R. 462.

(8) (1915) 22 C. L. J. 333.

The result is that the Rule is made absolute in part ; the order of the 23rd March, 1914 is varied to this extent, namely, that the decree passed by the Subordinate Judge, on the 23rd May, 1913, is set aside only in so far as it affects the first two defendants and the appeal is revived to be re-heard at their instance and for their benefit alone. The suit must be deemed to have been finally decreed in favour of the plaintiffs as against the other three defendants, and, so far as they are concerned, the decree of this Court dated the 5th December, 1913 in affirmance of the decree of the Subordinate Judge dated the 23rd May, 1913 which in its term had affirmed the decree of the primary Court dated the 18th June, 1912, will stand. As the petitioners have succeeded only in part, there will be no order for costs.

A. T. M.

*Rule made absolute in part.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.*

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*Ejectment, decree for—Appellate decree—Merger of original decree—Appeal dismissed for default—Decree, which, to be executed—Civil Procedure Code (Act V of 1908) O. 21 R. 22—Omission to give notice, effect of—Conditional decree, execution of—Notice, if necessary—Decree incapable of execution, objection as to—Events subsequent—Bengal Tenancy Act (VIII of 1885), sec. 155—Tenancy continues how long—Time, extension of.*

The original decree is merged in the appellate decree whether the latter confirms, amends or reverses the original decree, and it is the appellate decree alone which can be executed : *Abdur v. Maidin* (1) and *Chandra Kant v. Lakshman* (2) referred to. But this doctrine cannot be applied where the appeal is dismissed for default.

Where an appeal against an original decree has been dismissed for default, the original decree is the decree to be executed.

The omission to give notice, as required by O. 21 R. 22 of the Code of Civil Procedure, is not a mere irregularity which makes the proceeding voidable, but

\* Civil Rule No. 493 of 1916, against an order of Babu Dwijendra Nath Pal, Munsiff of Barupur, dated the 18th April, 1916.

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is a defect which goes to the root of the proceeding and renders it void for want of jurisdiction.

*Gopal v. Gunamani* (1); *Sahdeo v. Ghasiram* (2) and *Parashram v. Balmukund* (3) referred to.

Such omission renders proceedings inoperative even though a stranger may have acquired title in course thereof.

Even where O. 21 R. 22 of the Code of Civil Procedure does not apply, the Court should issue a notice on the judgment-debtor and hear his objection, if any, before it grants execution of a conditional decree on the *ex parte* statement of the decree-holder that the contingency contemplated has happened.

Where an *ex parte* order has been made to the prejudice of a litigant who has not been afforded an opportunity to be heard, the order is subject to the implication that it may be revoked at the instance of the party affected thereby and the Court has inherent power to give such directions as the justice of the case may require.

An objection that a decree for ejectment previously obtained, has become incapable of execution by reason of events subsequent, can be properly taken in execution of the decree.

The tenancy continues in operation till the failure of the tenant to comply with the decree made under section 155 of the Bengal Tenancy Act within the time prescribed thereby.

*Dendy v. Evans* (4) referred to.

Section 155 of the Bengal Tenancy Act enables the Court to give the tenant relief on the footing that there shall be no forfeiture at all; when relief is granted, the forfeiture is stopped *in limine*, so that there is no question of any destruction of an interest which has to be called into existence again.

It is competent to the Court to entertain an application for enlargement of time after the expiry of the period prescribed in the decree under section 155 of the Bengal Tenancy Act and even after the decree-holder has applied for execution.

*Siunaman v. Sham Charan* (5) referred to.

Whether an order for extension of time should be made or not, depends upon the circumstances of the litigation, that is, upon the circumstances disclosed at the original trial and the events subsequent.

Application under section 115 of the Code of Civil Procedure and section 107 of the Government of India Act, 1915 by the Judgment-debtor.

Proceedings in execution of a decree in a suit for ejectment.

The material facts and arguments appear from the judgment.

*Babu Sarada Charan Maiti* for the Petitioner.

*Babu Manmatha Nath Ray* for the Opposite Party.

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(1) (1892) I. L. R. 20 Calc. 370.

(3) (1908) I. L. R. 32 Bom. 572.

(5) (1912) 16 C.L.J. 520.

(2) (1893) I. L. R. 21 Calc. 19.

(4) (1910) 1 K. B. 263.

• The judgment of the Court was delivered by

**Mookerjee, J.**—We are invited in this Rule to examine the legality of an order made in proceedings in execution of a decree in a suit for ejectment of a tenant on the ground of forfeiture for misuse of the lands of his tenancy.

The petitioner was an occupancy ryot under the opposite party and was consequently liable under Sec. 25 of the Bengal Tenancy Act to be ejected by his landlords from his holding in execution of a decree for ejectment passed on the ground that he had used the land comprised in his holding in a manner which rendered it unfit for the purposes of the tenancy. In 1912, the landlords instituted a suit against him under section 155 (1) (a) of the Bengal Tenancy Act to eject him on the ground that he had excavated a tank on his holding which rendered it unfit for the purposes of the tenancy. The suit was decreed by the trial Court on the 6th November, 1914 in the following terms: "the defendant do fill up the tank by the end of the present Bengali year 1321 (*i.e.*, 13th April 1915) or, in the alternative, do pay Rs. 125 to the plaintiffs as compensation within that time; if he fails to carry out either of the two alternative directions within the time fixed, he will be ejected from the entire holding by executing the decree." The petitioner, who was defendant in that suit, appealed against this decree. During the pendency of the appeal, the landlords instituted a suit against him on the 17th March, 1915 to recover from him arrears of rent due from the beginning of the Bengali year 1318 (*i.e.*, 14th April, 1911) to the end of Pous, 1321 (*i.e.*, 14th January, 1915). The claim was decreed in full on the 15th January, 1916. The appeal against the decree in the suit for ejectment was then taken up for disposal on the 13th March, 1916, and was dismissed for default. An application was made for restoration of the appeal, but was summarily rejected. An appeal was thereupon lodged in this Court against the order of refusal to revive the appeal before the District Judge; that appeal is still pending here. Meanwhile, on the 24th March, 1916, the landlords applied to the trial Court to execute the decree of the 6th November, 1914, by ejectment of the defendant. No notice was served upon the defendant, the writ was issued forthwith, and, two days later, what is called symbolical delivery of possession was given to the landlords. The tenant thus apprised of what had taken place applied to the trial Court on the 1st April, 1916, and prayed that the *ex parte* proceedings for delivery of possession should be cancelled. His contention was twofold, namely, first, that the decree of the 6th November, 1914,

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had become incapable of execution as the landlords had waived the forfeiture by the subsequent institution of the suit for rent, and, *secondly*, that the Court should, in the exercise of its judicial discretion, make an order for extension of time for the performance of the decree under Sec. 155 (3). The Court overruled these contentions on the 18th April, 1916. The present Rule was thereupon issued by this Court on the 19th June, under Sec. 115 of the C. P. Code and Sec. 107 of the Govt. of India Act, 1915.

Before we deal with the questions in controversy, we may observe that when the landlords applied for execution on the 24th March, 1916, the application was correctly described as one for execution of the decree of the 6th November, 1914, because on that date the only decree capable of execution was that decree. There is really no foundation for the suggestion, somewhat plausibly made in this Court on behalf of the decree-holders, that by reason of the dismissal of the appeal to the District Judge on the 13th March, 1916, the decree of the trial Court had been merged in the decree of the appellate Court and had been superseded thereby. It is indisputable that the original decree is merged in the appellate decree whether the latter confirms amends or reverses the original decree, and it is the appellate decree alone which can be executed [See the authorities collected in *Abdul v. Maidin* (1) and *Chandra Kant v. Lakshman* (2)]. But this doctrine cannot be applied where the appeal is dismissed for default; in such a case, the appeal fails for non-prosecution and it cannot appropriately be said that the Court of appeal adopts the decree of the primary Court. This was recognised by Sir Barnes Peacock, C. J. when in his judgment in the Full Bench Case of *Bipro Doss v. Chunder Seekur* (3), he observed that if in the case of an appeal, a new judgment of affirmance of the former decree should be given, then a new judgment would have to be executed, but if the appeal were dismissed for default, there would be no new judgment and the judgment of the lower Court would be the judgment to be enforced. This view was adopted by a Full Bench of the Madras High Court in *Virasamy v. Manommany* (4) and has now been accepted by the Legislature in the definition of the term "decree" in Sec. 2 (2) of the Civil Procedure Code of 1908, which expressly provides that any order of dismissal for default is not a decree. We are not now concerned with the question of the period of limitation applicable to an application for execution of an original decree when an appeal against

(1) (1896) I. L. R. 22 Bom. 500 (506). (2) (1916) 24 C. L. J. 517.

(3) (1867) 7 W. R. 521.

(4) (1868) 4 Mad. H. C. R. 32 (39).

such decree has been dismissed for default; the answer to that question will depend upon the true construction of Art. 182 (2) of the first schedule to the Indian Limitation Act 1908, which, it may be incidentally observed, introduces at least one important variation from the corresponding provision of the previous statutes of limitation. In our opinion it is fairly clear that when an appeal against an original decree has been dismissed for default, the order of dismissal is not a decree, that there is, consequently, neither in form nor in substance an appellate decree wherein the original decree may be deemed to have become merged, and that the original decree is thus the decree to be executed, notwithstanding the dismissal of the appeal for default. What, then, is the inevitable consequence of the application of this principle to the case before us? The decree, which was sought to be executed by the application of the 24th March, 1916, was the decree of the 6th November, 1914. As more than one year had elapsed from the date of the decree, it was incumbent upon the Court to issue a notice to the judgment-debtor under rule 22 (1) (a) of O. 21 of the Code. This was not done, and the reason why the decree-holders did not move the Court to issue the requisite notice is transparent; their intention, no doubt, was to take possession in execution as expeditiously as possible, without opportunity afforded to the judgment-debtor to raise any objection. The delivery of possession was effected, as we have seen, on the second day after the issue of the writ. Such execution, in contravention of the express provisions of the statute, cannot possibly prejudice the position of the judgment-debtor or embarrass the Court in the determination of the merits of the controversy between the parties. It was pointed out by the Judicial Committee in *Raghunath Das v. Sundar Das* (1) that the notice prescribed by section 248 of the Code of 1882 (now replaced by O. 21 R. 22) is necessary in order that the Court should obtain jurisdiction to proceed against the property of the judgment-debtor by way of execution. The omission to give notice, as required by the rule, is not a mere irregularity which makes the proceeding voidable, but is a defect which goes to the root of the proceeding and renders it void for want of jurisdiction: *Gopal v. Gunamoni* (2); *Sahdeo v. Ghasiram* (3); *Parashram v. Bal-mukund* (4). From the point of view that the notice is requisite as the very foundation of the jurisdiction of the Court, it is plain

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(1) (1914) L. R. 41 I. A. 251; I. L. R. 42 Calc. 72.

(2) (1892) I. L. R. 20 Calc. 370. (3) (1893) I. L. R. 21 Calc. 19.

(4) (1908) I. L. R. 32 Bom. 572.

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that the proceedings must be treated as inoperative even though a stranger may have acquired title in course thereof; but the position is obviously worse where the decree-holders themselves profess to acquire title on the basis of proceedings initiated by them and carried on in defiance of statutory requirements. We may add that, as explained in the cases of *Sudevi v. Sovaram* (1) and *Bechu v. Bicharam* (2), even where section 248 of the Code of 1882 or order 21 rule 22 of the Code of 1908 does not apply, the Court should issue a notice on the judgment-debtor and hear his objection, if any, before it grants execution of a conditional decree on the *ex parte* statement of the decree-holder that the contingency contemplated has happened. We are consequently of opinion that the delivery of possession, which is said to have taken place on the 26th March, 1916, cannot hamper us in the least degree and that we should deal with the case as if that delivery of possession had never taken place. We are further of opinion that the Court below also should have considered the matter from this point of view; as explained in *Tikait Ajant Singh v. Christien* (3), when an *ex parte* order has been made to the prejudice of a litigant who has not been afforded an opportunity to be heard—an opportunity which, in this case he was entitled to have, under express statutory provisions—the order must be regarded as subject to the implication that it may be revoked at the instance of the party affected thereby and the Court has inherent power to give such directions as the justice of the case may require. We shall now proceed to examine the two grounds urged by the judgment-debtor in the Court below and reiterated here.

The first contention of the judgment-debtor is to the effect that the institution of the suit for rent by the landlords has rendered the decree for ejectment previously obtained incapable of execution; the argument in substance is that the forfeiture has been waived. It is clear that an objection of this character may properly be taken in proceedings in execution of the decree; the judgment-debtor, when he takes such objection, does not attack the decree; he merely urges that the decree, though properly made, has, by reason of events subsequent, become incapable of execution. Thus, it was ruled in *Nubo Kishen v. Hurish Chunder*, (4) that receipt of rent subsequent to a decree for ejectment under section 78 of the Bengal Rent Act, 1859, from a tenant against whom the decree was passed, renders execution of the decree impossible. Similarly, it

(1) (1906) 10 C. W. N. 306.

(2) (1909) 10 C. L. J. 91.

(3) (1912) 17 C. W. N. 862.

(4) (1867) 7 W. R. 142.

was ruled by the Judicial Committee in *Forbes v. Maharaj Bahadur Singh* (1) that a decree for ejectment made against a tenant at the instance of his landlord under section 66 (1) of the Bengal Tenancy Act, cannot be executed, if the decree-holder ceases to be the landlord after he has obtained the decree. We must, consequently, consider the effect of the institution of the suit for rent on the decree for ejectment. The judgment-debtor argues that the suit for ejectment was instituted and could have been instituted, only, on the hypothesis that his tenancy had been forfeited by misuse of the lands, that the institution of the suit was the final election by the landlords to avail themselves of the forfeiture which had thus taken place, and that the institution of the suit for rent for a period subsequent to the date of commencement of the suit for ejectment accordingly operated as a waiver by the landlords of the forfeiture. To test the correctness of this argument, three propositions may be premised, namely, *first*, that a suit for ejectment of a tenant on the ground of forfeiture is instituted on the theory that the forfeiture has taken place prior to the commencement of the action, in other words, that the landlord has, when he comes into Court, a subsisting cause of action by reason of the unlawful possession of the tenant notwithstanding the determination of his tenancy : *Greenfield v. Hanson* (2) ; *Wilson v. Rosenthal* (3) ; *Deo Nundan v. Meghu Malton* (4) ; *secondly*, that as it is at the option of the landlord whether he will take advantage of the forfeiture or not, he may indicate his election by the institution of a suit for ejectment : *Serjeant v. Nash* (5) ; *Grimwood v. Moss* (6) ; *Jones v. Carter* (7) ; *Kilkenny Gas Co. v. Somerville* (8) ; and, *thirdly*, that the forfeiture is waived by the institution of a suit for or by the mere receipt of, rent which has accrued due since the cause of forfeiture : *Dendy v. Nicholl* (9) ; *Penton v. Barnett* (10) ; *Raj Mohan v. Mati Lal* (11) ; But there is also authority for the position that the receipt of rent, after an ejectment brought on a forfeiture, is no waiver of such forfeiture : *Doe d Morecroft v. Meux* (12) ; *Toleman v. Portbury* (13). These propositions are of no assistance to the tenant in the case before us. Assume that there was a forfeiture of the tenancy by

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(1) (1914) I. L. R. 41 Cal. 926.

(2) (1886) 2. T. L. R. 896.

(3) (1906) 22 T. L. R. 233.

(4) (1906) 11 C. W. N. 225.

(5) (1903) 2 K. B. 304.

(6) (1872) L. R. 7 C. P. 360.

(7) (1846) 15 M. &amp; W. 718.

(8) (1878) 2 L. R. Ir. 192.

(9) (1858) 4 C. B. N. S. 376.

(10) (1898) 1 Q. B. 276.

(11) (1915) 22 C. L. J. 546.

(12) (1824) 1 C &amp; P. 346 ; (1825) 4 B &amp; C 606.

(13) (1871) L. R. 6 Q. B. 245.

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reason of misuse of the land, that the landlords elected to avail themselves of the forfeiture, and that they instituted the suit for ejectment on this basis. Do these premises necessarily show that they waived the forfeiture when they instituted the suit for rent which had accrued due since the commencement of the suit for ejectment? There might have been no escape from an inference that there had been such waiver, if there had been no provision for relief against forfeiture. The true question in controversy is, how is the status of the tenant affected by the provision for relief against forfeiture embodied in section 155. There are three alternative views possible, namely, *first*, that the tenancy continues in operation till the failure of the tenant to comply with the decree made under section 155 within the time prescribed thereby; *secondly*, that the tenancy remains in abeyance, and terminates with retrospective effect if the decree is not carried out, but revives with intermediate operation if the tenant fulfils the conditions imposed by the decree; *thirdly*, that the tenancy finally terminates on the indication of election by the landlord by the institution of the suit for ejectment, but a new tenancy is created if the decree is obeyed. We are of opinion that the second and third alternatives must be rejected—the former on the ground that a right cannot ordinarily remain in a state of suspense or abeyance, the latter on the ground that the creation of a new tenancy cannot appropriately be deemed a *relief* against forfeiture. The first alternative is, we think, free from objection, and this was the view recently adopted by the Court of Appeal in England in *Dendy v. Evans* (1), which affirmed the decision of Darling, J. in *Dendy v. Evans* (2). In that case, a lease of premises contained a covenant by the lessee to keep the premises in repair, and there was a proviso for re-entry upon breach of any covenant in the lease. The lessee sublet the premises to the defendant. The underlease contained a covenant to repair similar to that in the head lease and a similar proviso for re-entry. The premises went out of repair and the lessor issued a writ against the lessee to recover possession thereof. The lessee thereupon assigned to the plaintiff the term granted by the lease and the benefit of the arrears of rent. The plaintiff applied for and obtained an order under section 14 (2) of the Conveyancing Act, 1881, that all further proceedings in the action should be stayed and that the plaintiff should have relief from the forfeiture and should hold the premises according to the old lease without any new lease. The plaintiff then brought an

(1) (1910) 1 K. B. 263.

(2) (1909) 2 K. B. 894.

action against the defendant to recover rent due upon the under-lease, subsequent to the issue and service of the writ by the lessor to recover possession of the premises. The question arose, whether the issue and service of the writ by the lessor, which clearly operated as a final election by him to determine the lease, had extinguished the title of the plaintiff. Darling J. ruled that *the effect of the subsequent order for relief was to restore the lease as if it had never become forfeited*, with the result that the under-lease also remained in existence and the plaintiff was entitled to recover the amount claimed. The true position then is that the word "relief" carries with it the meaning that the forfeiture is deemed not to have taken place at all, in other words, as soon as the relief is granted, the forfeiture disappears just as if there never had been any forfeiture at all. The history of the development of this principle indicates that the question is by no means free from difficulty. Before the Landlord and Tenant Act 1730, when a Court of equity gave relief from forfeiture for non-payment of rent, it was done, in some instances, by grant of an injunction to restrain further proceeding at law so that the old lease continued, and in other cases, by a direction on the landlord to grant a new lease, as explained by Wigram, V. C. in *Bowser v. Colby* (1). (See also the judgment of Day J. in *Hare v. Elms* (2). The statute just mentioned provided that in all such cases, the lessee should hold the demised lands according to the lease made without any new lease. This was re-enacted in 1872 in section 212 of the Common Law Procedure Act, which has now been replaced by section 14 (2) of the Conveyancing Act, 1881. With reference to this statute, which is closely analogous to section 155 of the Bengal Tenancy Act, the decision in *Dendy v. Evans* (3) was given. Cozens Hardy, M. R., refused to listen to the suggestion that the effect of the grant of relief against forfeiture was merely to resuscitate the lease or to grant a new lease from the date of the order; it was the original lease, he observed, which continued for all purposes, not a new lease. Farwell, L. J. relied upon the definition of the term "relief" given by Lord Davey in *Nind v. Nineteenth Century* (4), the words "relief" and "relieve" are the appropriate terms to describe the remedial action of the Court of equity in cases where a penalty of forfeiture has been incurred, which, the Court thinks it equitable that the complainant should not lie under or suffer." Reliance was also placed, by way of analogy, upon the well-known principle applied to mortgage cases,

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(1) (1841) 1 Hare 109 (126).

(2) (1893) 1 Q. B. 604.

(3) (1910) 1 K. B. 263.

(4) (1894) 2 Q. B. 226.



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as enunciated by Lord Hatherly in *Thompson v. Hudson* (1), "equity regards the security that has been given as a mere pledge for the debt, and it will not allow a forfeiture of the property pledged, on the ground that equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the nature of a penal provision, against which equity will relieve when the object in view, namely, the securing of the debt, is attained." It is thus apparent that section 155 of the Bengal Tenancy Act enables the Court to give the tenant relief on the footing that there shall be no forfeiture at all; when relief is granted, the forfeiture is stopped *in limine*, so that there is no question of any destruction of an interest which has to be called into existence again. The tenant consequently continued in the case before us, as a tenant at least up to the 13th April, 1915, the date fixed in the decree for performance of the obligation imposed on him thereby. There could thus be no waiver of a forfeiture by the institution on the 17th March, 1915 of a suit for rent for the period between the 14th April, 1911 and the 14th January, 1915. The decree for ejectment did not consequently cease to be enforceable by reason of events subsequent.

The second contention of the judgment-debtor is to the effect that this is a fit case for extension of the period fixed by the decree for the performance thereof under section 155 (3). The decree-holders contend that an application for extension of time cannot be entertained if made after the expiry of the prescribed period. There is no force in this contention: it appears from the decision in *Sinnaman v. Shamcharan* (2), that it is competent to the Court to entertain an application for enlargement of time after the expiry of the period prescribed in the decree and even after the decree-holder has applied for execution. This was ruled with reference to section 178 (3) of the Chota Nagpur Tenancy Act, 1908 which is moulded on section 155 of the Bengal Tenancy Act. A remedial provision of this character should be construed liberally so as not to restrict the remedy and fetter the discretion of the Court. Whether an order for extension of time should be made or not depends, however, upon the circumstances of the litigation, *i. e.*, upon the circumstances disclosed at the original trial and the events subsequent. We have carefully considered the matter from this point of view, and taken into account all that has been urged for and against the application. We have arrived at the conclusion

(1) (1869) L. R. 4 H. L. 1 (15.)

(2) (1912) 16 C. L. J. 520; 16 C. W. N. 1090.

that the time fixed for performance of the decree should be extended up to the 4th September next. The judgment-debtor will be at liberty to deposit in this Court, to the credit of the opposite parties, Rs. 125 on or before the 4th September next. If the deposit is so made, the Rule will be made absolute and the order of the Court below will stand discharged; an order will also be made that the petitioner be forthwith restored to possession, and such order will be executed by the Court below as a decree of this Court. An order will also be made, by consent of parties, in the appeal now pending in this Court against the order for refusal to restore the appeal before the District Judge, that the appeal do stand dismissed without costs. If on the other hand, the deposit is not made as directed, the Rule will stand discharged. The final order in these proceedings will be drawn up in this Court according to the event which happens, that is, according as the deposit is or is not made within the time now fixed. •

As the petitioner obtains an extension of time and fails in his objection to execution, he must pay to the opposite party the costs of this Rule which we assess at one gold mohur.

A. T. M.

*Rule conditionally made absolute.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and  
Mr. Justice Cuming.*

SURENDRA NATH GOSWAMI AND OTHERS

v.

BANGSIBADAN GOSWAMI AND OTHERS.\*

*Decree, execution of—Attachment of debt payable outside jurisdiction—Attachment, effect of—Money paid under an illegal order, where to be refunded.*

It is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of that Court.

When a Court has manifestly usurped jurisdiction and has illegally secured possession of a fund, which should not have come under its control, its orders must be discharged. Such illegal orders cannot stand on the plea that possibly similar orders would have been made by a Court of competent jurisdiction.

\* Civil Rule No. 641 of 1916, against an order of Babu Kali Kumar Sarkar, Subordinate Judge of Nadia, dated the 3rd July, 1916.

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The money which has been paid out of Court under an illegal order made without jurisdiction, must be brought back into Court.

Application for revision by the Objectors.

The petitioners objected to the payment of money to the decree-holders, opposite party, on the allegation that they had acquired a valid title to the same.

The material facts and arguments appear from the judgment.

*Babus Asiranjana Chatterjee and Narendra Nath Chowdhry* for the Petitioners.

*Babus Provas Chunder Mitter and Tarakeshwar Pal Chowdhry* for the Opposite Party.

The judgment of the Court was delivered by

August, 30.

**Mookerjee, J.**—We are invited in this Rule to examine the legality of an order made by the Court below, for the payment of a sum of money, to the decree-holders opposite party. The facts material for the determination of the questions in controversy may be shortly stated. On the 30th June 1914, the plaintiffs instituted a suit for recovery of money against the defendant in the Court of the Subordinate Judge of Nadia. On the next day, they applied for an order for attachment before judgment in respect of a sum of Rs. 4,200 due to the defendant from the East India Railway authorities for work executed under a contract. The Subordinate Judge, on that date, made a preliminary order on the application under rule 5 of order 38 of the Code. The order called upon the defendant to show cause why he should not furnish security for the sum mentioned and why, on his failure to do so, an order for attachment of the sum before judgment should not be made. The Court also proceeded to make an *ad interim* order for attachment under clause (3) of rule 5. This *ad interim* order was communicated to the officer of the East India Railway who had the money at his disposal. It is inexplicable how the Subordinate Judge came to pass this order, as the officer resided beyond his jurisdiction and the debt due to the defendant was not payable within his jurisdiction. On service of notice upon the officer, the money was however transmitted to the Subordinate Judge on the 8th March 1916 by means of a cheque on the Bank of Bengal. Thereafter, for some unexplained reason, the application for attachment before judgment was not further considered, although the case came before the Subordinate Judge on many occasions. Ultimately, an *ex parte* decree was made in favour of the plaintiff on the 23rd November 1914. The position, consequently, on that date

was, that the application for attachment before judgment lapsed ; but a large sum of money later on came into the custody of the Court, placed at its disposal by the Railway authorities. The petitioners, who have obtained this Rule, then appeared before the Subordinate Judge, and raised objection to the payment of this money to the decree-holders, on the allegation that they had acquired a valid title to the same, while it was still in the hands of the Railway authorities, by virtue of an assignment in their favour by the defendant-debtor on the 22nd August 1915. The Subordinate Judge over-ruled the objection, and on the 8th and 27th March 1916 the money was paid out to the decree-holders in two instalments, on the basis of an application for execution, presented on the 4th February 1916, but not followed by an order for attachment, obviously on the erroneous assumption that a valid order for attachment before judgment, had been previously made and was still in operation ; no such order, as we have seen, had ever been made, none could have been, indeed, legally made, and none was in force, in fact or in law. \* It is obvious that the action taken by the Subordinate Judge in this matter has been illegal from beginning to end, although even on review, he has declined to recall his order on the 3rd July 1916.

As pointed out by this Court in the case of *Begg Dunlop & Co. v. Jagannath Marwari* (1) it is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of that Court. Consequently, in the case before us, the application for attachment before judgment of the money in the hands of the railway authorities should never have been entertained by the Subordinate Judge. The *ad interim* order was thus entirely without jurisdiction. The ultimate order contemplated by the Code, was, as we have seen, never passed. The position, consequently, was that the Court had, in its hands, money which could not have been in law and had never been in fact, duly attached, which had been in reality obtained by usurpation of jurisdiction. There is thus no escape from the conclusion that the money was obtained and was paid out to the decree-holders wholly without authority. In these circumstances, there can be no serious controversy that the illegal orders must be cancelled and the parties restored to the positions they respectively occupied before the illegal intervention

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of the lower Court. We have been, however, pressed by the decree-holders to stay our hands on the ground, that the merits as they allege, are in their favour. It cannot be overlooked, however, that the merits, assuming them to have been investigated at all, have been determined by a Court which had usurped jurisdiction and was not competent to discuss the matters in controversy. In our opinion, when a Court has manifestly usurped jurisdiction and has illegally secured possession of a fund, which should not have come under its control, its orders must be discharged; it would be lamentable to allow such illegal orders to stand on the plea that possibly similar orders would have been made by a Court of competent jurisdiction. In this connection, the weighty words of Lord Halsbury in *Farquharson v. Morgan* (1) may be usefully recalled: "It has been long settled that where an objection to the jurisdiction of an inferior Court appears from the face of the proceedings, it is immaterial by what means and by whom the Court is informed of such objection. The Court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior Court from proceeding in matters as to which it is apparent that it has no jurisdiction. The objection to the jurisdiction does not in such a case depend on some matter of fact as to which the inferior Court may have been deceived or misled, or which it may have unconsciously neglected to observe, and the Judge of such Court therefore must or ought to have known that he was acting beyond his jurisdiction." Lord Davey in the same case referred to the decision in *Worthington v. Jeffries* (2) and observed that it has always been the policy of the law, as a question of public order, to keep inferior Courts strictly within their proper sphere of jurisdiction [See also *Burder v. Veley* (3); *DeHaber v. Queen of Portugal* (4); *London Corporation v. Cox* (5)]. We are clearly of opinion that the proceedings in the Court below, have been *ultra vires* throughout and that the orders of the Subordinate Judge for payment of the fund in his hands, made on the 8th and 27th March 1916, must be cancelled.

The result is that the Rule is made absolute and all the orders of the Subordinate Judge in this matter discharged. The decree-holders are directed to bring back into the lower Court, on or before the 15th November next, the sums they have withdrawn from that Court, together with interest thereon at 3½ per cent. per annum. The sum must be refunded, in the Court of

(1) (1894) 1 Q. B. 552.

(2) (1875) L. R. 10 C. P. 379.

(3) (1840) 12 A. &amp; E. 233.

(4) (1851) 17 Q. B. 171.

(5) (1866) L. R. 2 H. L. 239 (278).

the Subordinate Judge of Nadia, because it was from that Court that the money was withdrawn under an order made without jurisdiction. If the money is not refunded, on or before the 15th November next, as now directed, the Subordinate Judge will forthwith proceed to execute the order of this Court and realise the money by attachment and sale of the movable and immovable properties of the decree-holders and by attachment of their persons, if necessary. This procedure must be adopted, whether the petitioners take any steps in that behalf or not, as it is imperative that the money which has been paid out of Court under an illegal order made without jurisdiction, must be brought back into Court. We hope, however, that it will not be necessary for the Subordinate Judge to take a step of this character and that the decree-holders will bring back the money into Court on or before the 15th November next as directed. As soon as the money has been refunded, it will be transmitted by the Subordinate Judge to the Court of the Subordinate Judge of Hooghly, which is the Court of competent jurisdiction in this matter ; at the same time, the application made by the decree-holders on the 4th February 1916 for execution of their decree against their judgment-debtor, will be transmitted to that Court. The Subordinate Judge of Hooghly will keep the money in his Court suitably invested, if necessary, and will proceed to deal with the application for execution. He will, along therewith, take up for determination the objection of the present petitioners, namely, that they had acquired a valid title to this fund under an assignment made in their favour on the 22nd August, 1915 by the debtor of the decree-holders. They have in this Court produced the deed of assignment, which will be received here and marked as an exhibit and will be transmitted to the Court of the Subordinate Judge of Nadia, to be transmitted by that officer to the Court of the Subordinate Judge of Hooghly along with the application for execution of the decree-holders. The decree-holders will be at liberty to amend their application for execution, after notice to the judgment-debtor and the objectors. The Subordinate Judge will receive such evidence as may be adduced by the parties for the elucidation of the questions in controversy ; but we may add that we hold that there was no valid attachment of this fund on the 22nd August 1915, so that if it is established that the assignment related to this fund, and was valid and operative, the decree-holders are not entitled to proceed against it. There will be no order for costs in these proceedings.

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## APPELLATE CIVIL.

*Before Mr. Justice D. Chatterjee and Mr. Justice Chapman.*

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1914.

April, 22.

BAISNAB CHARAN DE AND ANOTHER

v.

SARAT CHANDRA KAR AND OTHERS. \*

*Sub-lease—Validity, who can question—Bengal Tenancy Act (VIII of 1885), Sec. 85 (1)*

Where a sub-lease created by a raiyat for a term exceeding nine years was the only title on which the grantee relied so that he could not fall back on prior possession as tenant or otherwise, his suit to recover *khaz* possession was dismissed.

*Jarip v. Dorfa* (1) followed.

Appeal by the Plaintiffs.

Suit for the *khaz* possession on a declaration of plaintiffs' *dar-raiyati* right.

Plaintiffs got *bandobust* of the land from the defendants Nos. 12 and 13, who had acquired the *rayati* right of the original holder, K, and who had previously granted *dar-raiyati* to the defendant No. 1 and the father of the defendant No. 2, which he had himself purchased in execution of his own decree for rent. The suit was contested by the defendants Nos. 1, 8, 9 and 11, who denied having dispossessed the plaintiffs, and claimed to have been in possession for about 12 years. The under-raiyati lease of the plaintiffs is for a period of above 9 years, and one of the contentions of the defendants was that it was void and could not create any title in the plaintiffs.

The lower Courts found that the plaintiffs got no subsisting interest or tenancy which they could prove by other means independent of the written lease which is void under Cl. (2) of section 85 of the Bengal Tenancy Act, and that though the defendants were trespassers in the sense that their right was sold away, they were never ousted by their landlords and could not be ousted by the plaintiffs. The suit was therefore dismissed. Hence this appeal.

\* Appeal from Appellate Decree No. 3109 of 1911, against the decision of Babu Rajani Kanta Chatterjee, Subordinate Judge of Chittagong, dated the 8th August, 1911, affirming that of Babu Nogensdra Kumar Bose, Munsiff at South Ranzan, dated the 27th September, 1910.

(1) (1912) 16 C. L. J. 144 ; 17 C. W. N. 59.

*Babu Probodh Kumar Dass* for the Appellants.

*Babu Khitis Chunder Sen* for the Respondents.

The judgment of the Court was as follows :—

The entire ground in this case is covered by the authority case of *Jarip Khan v. Dorfa Bewa* (1). The appeal is dismissed with costs.

(1) (1912) 16 C. L. J. 144 ; 17 C. W. N. 59.

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Baisnab Charan

v.  
Sarat Chandra.

April, 22.

*Before Mr. Justice Fletcher and Mr. Justice Richardson.*

GONESH MONDOL

v.

THANDA NAMASUNDRANI AND OTHERS. \*

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1914.

July, 27.

*Sub-lease—Bengal Tenancy Act (VIII of 1885), Sec. 85—Admissibility in evidence—Oral evidence of the terms of agreement—Evidence Act (I of 1872), Sec. 91.*

Where a sub-lease has been registered in contravention of the terms of section 85 of the Bengal Tenancy Act and has been followed by possession, the sub-lessee, if dispossessed, is entitled to recover possession.

*Manik v. Bani* (1) followed.

*Jarip v. Dorfa* (2) distinguished.

Appeal by Defendant No. 1.

Suit for ejectment.

The disputed land was leased to the plaintiff by one Tarini Charan Sen, who was the raiyat with a right of occupancy. Tarini subsequently let out the land to the defendant. The contention was that as the under-lease to the plaintiff was in excess of the period authorised by section 85 of the Bengal Tenancy Act, it was invalid.

*Babu Surendra Chandra Sen* for the Appellant.

*Babu Sarat Chunder Roy Chowdhury* for the Respondents.

The judgments of the Court were as follows :

\* Appeal from Appellate Decree No. 2246 of 1912, against the decision of Babu Debendra Nath Pal, officiating Subordinate Judge of Jessore, dated the 1st May, 1912, reversing that of Babu Romesh Chandra Basu, Munsiff 1st Court at Magura, dated the 25th March, 1911.

(1) (1910) 13 C. L. J. 649. (2) (1912) 16 C. L. J. 144 ; 17 C. W. N. 59.



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Gonesh

v.

Thanda Nama-  
sundrani.

July, 27.

**Fletcher J.**—This is an appeal from the decision of the Subordinate Judge of Jessore, dated the 1st May, 1912, reversing the decision of the Munsiff of Magura.

The appeal is by the defendant No. 1. The plaintiff sued to recover possession of certain land which had been leased to (or, as they say in this country, settled with) her by one Tarini Charan Sen, who was the *raiyat* of the land with the right of occupancy. After the lease to the plaintiff, Tarini Charan Sen let out the land to the defendant; and the plaintiff has now brought the present suit to recover possession of the land.

A point has been argued before us, namely, with reference to section 85 of the Bengal Tenancy Act. Under the terms of that section the under-lease to the plaintiff is in excess of the period authorised by the section and therefore ought not to have been registered. The cases in this Court on this point appear to be in a state of chaos. Those cases are numerous and are difficult to reconcile. The later authorities, however, agree in this, first of all, that under section 85 of the Bengal Tenancy Act, even if the sub-lease has, in contravention of the terms of section 85, been registered, it is inadmissible in evidence; and, *secondly*, that being so, under the provisions of the 91 section of the Indian Evidence Act, oral evidence cannot be given as to the terms of the agreement; that is when the case stands apart from any question of possession. It is only necessary to refer in that respect to the case of *Jarip Khan v. Dorfa Bewa* (1). That case has been followed in subsequent cases, namely, in the case of *Telam Pramanik v. Adu Sheikh* (2) and the case of *Baisnab v. Ram Kumar Kar* (3). The Chief Justice, however, in the case of *Jarip Khan v. Dorfa Bewa* (1) expressly stated that the case before him did not rest upon any question of possession having been given to the plaintiff; and in the course of his judgment he explained a decision that had been given by Mookerjee and Cox, JJ., in the case of *Manik v. Bani-charan* (4). It is quite true that the judgment of the learned Chief Justice shows that he did not approve of all the reasons that were given by Mookerjee and Cox, JJ. in *Jarip v. Dorfa* (1); but he considered that the case could have been decided on the findings of the learned Judges that the plaintiff in that case had had possession of the property. That seems to me to be the position of matters: because, as has been pointed out in this Court,

(1) (1912) 16 C. L. J. 144; 17 C. W. N. 59.

(2) (1913) 17 C. W. N. 468.

(3) (1914) 24 C. L. J. 538.

(4) (1910) 13 C. L. J. 649.

there is a class of cases in which it is said that where a tenant cannot, or does not, produce his lease in writing, he can, nevertheless, establish his tenancy from possession and other circumstances. The question in this case, therefore is :—Does the case fall within the decision of the case *Jarip v. Dorfa* (1) or does it fall within the decision in *Manik v. Bani* (2) as explained by the learned Chief Justice? That depends purely, in my opinion, on whether there has been a finding that the plaintiff was, in fact, in possession of this property, as sub-lessee, and was subsequently dispossessed by the appellant before us. It may be admitted that the finding as to possession is not clear and that the point is not altogether free from doubt. But from a perusal of the judgments of both the Courts below, I think that the lower Courts have in fact, found that the plaintiff was in possession of the property, because their finding is that, the plaintiff having been in possession was subsequently ousted by the defendant No. 1, and therefore the suit was not barred by limitation. Now, that being the fact found, namely, that the plaintiff was in possession of this property, as sub-lessee, I consider that this case falls within the decision of Mookerjee and Coxe, JJ. in *Manik v. Banicharan* (2) as explained by the learned Chief Justice in the case of *Jarip v. Dorfa* (1).

The present appeal, therefore, in my opinion, fails and must be dismissed with costs.

Richardson, J.—I agree.

A. T. M.

*Appeal dismissed.*

(1) (1912) 16 C. L. J. 144 ; 17 C. W. N. 59.

(2) (1910) 13 C. L. J. 649.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.*

BAMANDAS BHATTACHARYA AND OTHERS

*v.*

NILMADHAB SAHA AND OTHERS.\*

*Estoppel—Lessor and lessee—Lessee, if can question lessor's title—Sub-lease invalid—Bengal Tenancy Act (VIII of 1885), Sec. 85 (2)—Bengal Tenancy Act, scope of.*

\* Appeal from Original Decree No. 118 of 1914, against the decision of Babu Nogendra Nath Dhar, Subordinate Judge of Krishnagar, dated the 22nd December, 1913.

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The title of a grantee, who can fall back upon prior possession as tenant or otherwise, cannot be defeated by mere proof of contravention of section 85 of the Bengal Tenancy Act.

As between grantor and grantee, the rule of estoppel applies, when the elements essential to attract its operation are proved to exist.

The creation of the complete relation of landlord and tenant has the effect in law of estopping the tenant to deny the validity of the title which he has admitted to exist in the landlord ; the estoppel arises not by reason of some fact agreed or assumed to be true, but as the legal effect of carrying the contract into execution, of the tenant taking possession of the property from the hand of the lessor.

*Bhaiganta v. Himmat* (1) referred to.

Every estoppel ought to be reciprocal, that is, to bind both parties, and this is the reason that a stranger shall neither take advantage of nor be bound by the estoppel.

The Bengal Tenancy Act is not a complete Code even in respect of the law of landlord and tenant ; much less does it profess to incorporate the general principles of the law of contract and the doctrine of equity jurisprudence, in so far as they may have to be applied in the determination of disputes between landlords and tenants.

*Kripasindhu v. Annada Sundari* (2) referred to.

Under the under-tenure lease from the plaintiffs, who were subsequently found to be occupancy raiyats, the defendants entered into possession of the leasehold property :

*Held*, that the defendants could not be permitted to allege or prove that the plaintiffs were occupancy raiyats at the date of the lease executed in their favour ; that the defendants could not show that the lease was void and that no interest passed to them ; that the parties were mutually bound by the terms of the lease ; that it was no more open to the defendants than to the plaintiffs to prove facts contradictory to the allegations which formed the basis of the contract, after that contract had been carried into execution and the contracting parties had enjoyed benefit thereunder.

Appeal by the plaintiffs.

Suit for recovery of arrears of rent under a lease, and of damages for breach of a covenant contained therein.

The material facts and arguments appear from the judgment.

*Babus Mahendra Nath Ray, Baranashibasi Mukerjee, Kshetra Mohan Ghosh, Sarat Chandra De and Santosh Kumar Bose* for the Appellants.

*Sir S. P. Sinha (Advocate General), Babus Surendra Chandra Sen and Dwijendra Nath Mookerjee* for the Respondents.

C. A. V.

(1) (1916) 24 C. L. J. 103.

(2) (1907) 6 C. L. J. 273 ; I. L. R. 35 Calc. 34 ; 11 C. W. N. 983.

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The judgment of the Court was delivered by

**Mookerjee, J.**—This is an appeal by the plaintiffs in a suit for recovery of arrears of rent under a lease, and of damages for breach of a covenant contained therein. On the 27th August 1896, the plaintiffs granted the lease to the defendants in respect of an area of 942 bighas; the interest of the grantors was described as that of tenure-holders and the grantees who paid a premium of Rs. 1280 were made under-tenure-holders by the instrument. The rent was fixed in perpetuity at Rs. 688-4-0; the tenants undertook to pay Rs. 538-4-0 direct to the superior landlord of their grantors, and, the balance, Rs. 150, to the lessors themselves. The lease contained a covenant that if by reason of non-payment of the rent due to the superior landlords, year after year, instalment by instalment, a suit is brought against the lessors and if in execution of the rent decree the tenure or other property of the lessors is attached and sold in auction, the lessees will be bound to pay the rent due with interest, costs and damages, and the proper value of such properties of the lessors as may be sold. The contingency thus contemplated did not happen for many years as the lessees, who entered into possession of the lease-hold property under this instrument, duly performed their obligations. On the 29th November 1910 however the superior landlord instituted a suit against the present plaintiffs for recovery of rent for the two years 1908-10; it is not disputed that this rent had fallen into arrears, because the present defendants had failed to pay to the superior landlord, the rent due as they had undertaken to do in the lease. The suit was decreed on the 4th January, 1911 for a sum of Rs. 2987; execution was taken out in due course and the tenure was sold on the 14th June, 1911, when it was purchased by the present defendants for a sum of Rs. 1600. As the rent decree was thus satisfied only in part, the plaintiffs, on the 21st December, 1911, paid to the decree-holder as the balance of the judgment-debt, that is, a sum of Rs. 1264. The superior landlord, on the 10th May 1912, obtained against the plaintiffs a supplementary decree for Rs. 549 and costs and interest, on account of rent due for the period between the date of institution of the previous suit and the date of sale of the tenure. The plaintiffs satisfied this decree on the 30th June, 1912. On the 7th August 1912, they instituted this suit for recovery of Rs. 6470 composed of five items, namely, Rs. 1280 as their share of the proceeds of the sale held on the 14th June, 1911, Rs. 3000 as the value of the property sold, Rs. 1264 as the amount paid in satisfaction of the first decree, Rs. 626 as the amount paid to satisfy the second decree,

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and Rs. 300 as the arrears of rent due for two years. The defendants resisted the claim, substantially on the ground that the plaintiffs were not tenure-holders but occupancy-riyats, that the permanent lease in their favour was void and inoperative as granted in contravention of section 85 of the Bengal Tenancy Act, and, that they were, consequently, not bound by any of the covenants in the lease. They further pleaded that the damages claimed were excessive. The Subordinate Judge has found the main facts in favour of the plaintiffs, but he has dismissed the suit on the ground that, as the plaintiffs were in reality occupancy riyats and not tenure-holders, the lease was void under section 85 of the Bengal Tenancy Act. On the present appeal, the decree of the Subordinate Judge has been assailed as erroneous in law and as not really supported by the decisions mentioned by him, namely, *Jarip Khan v. Dorfa Beoa* (1) and *Telam Pramanik v. Adu Sheikh* (2).

Section 85 of the Bengal Tenancy Act provides as follows: "(1) if a ryot sublets otherwise than by a registered instrument, the sub-lease shall not be valid against his landlord, unless made with the landlord's consent. (2) A sub-lease by a ryot shall not be admitted to registration, if it purports to create a term exceeding nine years." The third sub-section refers to sub-leases granted before the commencement of the Bengal Tenancy Act and has obviously no possible application to the present case. The question for consideration is, whether the first two clauses apply, and, if so, what is their effect upon the rights of the parties. It is plain that the first sub-section has no application, because the superior landlord of the plaintiffs is not a party to this litigation, and neither the plaintiffs nor the defendants have argued that the lease of the 27th August, 1896 is valid against him. The controversy is thus restricted to the second sub-section. With reference thereto, the defendants contend that the lease of the 27th August, 1896 is in essence a sub-lease by a ryot within the meaning of sub-section 2, that it should not have been admitted to registration, that the fact of registration contrary to law must be ignored, that the instrument is thus inadmissible in evidence under section 49 of the Registration Act and that there is accordingly no proof that the defendants hold as tenants under the plaintiffs on the conditions mentioned therein. The plaintiffs put forward a twofold answer to this argument, namely, *first*, that the defendants, who entered into possession under the lease, are barred by the doctrine of estoppel and are not competent to ques-

(1) (1912) 16 C. L. J. 144 ; 17 C. W. N. 59.

(1913) 17 C. W. N. 468.

tion the title of their lessors as tenure-holders on proof that they were in reality occupancy-ryots, and, *secondly*, that if the defendants are permitted to question the title of their lessors and to prove that the instrument which is the root of their own title is inoperative under section 85 (2), still it is open to the plaintiffs to establish independently of the lease that the defendants were their tenants, that they entered upon the land as such, and that they have been in occupation for many years by payment of rent on certain terms and subject to certain liabilities in the event of default. It is obvious that the second branch of this contention will not require examination if the first is, as we think it must be, sustained.

It is well settled that the creation of the complete relation of landlord and tenant has the effect in law of estopping the tenant to deny the validity of the title which he has admitted to exist in the landlord; the estoppel arises not by reason of some fact agreed or assumed to be true, but as the legal effect of carrying the contract into execution, of the tenant taking possession of the property from the hand of the lessor. The grounds of this rule were recently examined by this Court in *Bhaiganta Bewa v. Himmat Bidyakar* (1), where the following observation was made: "Enjoyment by permission is the foundation of the rule, that a tenant shall not be permitted to dispute the title of his landlord; two conditions are essential to the existence of the estoppel, *first*, possession, *secondly*, permission; when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues." From this point of view, the defendants are not competent to deny that the plaintiffs are tenure-holders; they cannot be permitted to allege or prove that the plaintiffs were occupancy raiyats at the date of the lease executed in their favour; consequently, the case does not attract the operation of section 85 (2) of the Bengal Tenancy Act; in other words, the defendants cannot show that the lease was void and that no interest passed to them. The case thus falls within the rule that where no interest passes, an estoppel arises: *Trevivan v. Lawrance* (2) and, not within the converse rule that where an interest passes, no estoppel arises *Doed Strobe v. Seaton* (3), *Langford v. Selmes* (4). The justice of the view we take will be obvious from a consideration of the case converse to what has happened here. Suppose after the lessees had gone into possession, the lessors had sued to eject them on the plea that

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(1) (1916) 24 C. L. J. 103.

(2) (1705) 1 Salk. 276; 6 Mod. 258.

(3) (1835) 2 C. M. &amp; R. 728.

(4) (1857) 3 K. &amp; J. 220.

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they were occupancy raiyats and not tenure-holders and that the sub-lease was consequently void under section 85 (2). The lessees would plainly have been entitled to rely on the doctrine of estoppel to defend their position. But, as was pointed out by the Judicial Committee in *Girijakanta v. Hurrish Chandra* (1), and by the House of Lords in *Concha v. Concha* (2), estoppels are, as a general rule, mutual, or, in the language of Lord Coke: "Every estoppel ought to be reciprocal, that is, to bind both parties, and this is the reason that regularly a stranger shall neither take advantage of nor be bound by the estoppel." [Co. Litt 352; *Lilabati v. Bishan* (3)]. We feel no doubt whatever that the parties to this litigation are mutually bound by the terms of the lease of the 27th August, 1896, and that it is no more open to the defendants than to the plaintiffs to prove facts contradictory to the allegations which formed the basis of the contract, after that contract had been carried into execution and the contracting parties had enjoyed benefits thereunder. In fact, the Advocate General, with the candour which always characterises his arguments, did not seriously contest the correctness of this view.

The question remains, however, whether the numerous judicial decisions which interpret section 85 of the Bengal Tenancy Act and which are by no means easy to reconcile militate against this conclusion. The majority of those decisions, to which we shall presently make a brief reference, do not really touch the cardinal question in controversy in this suit; but before we consider them, two important principles may be conveniently re-stated. In the first place, as is clear from the decision of the Full Bench in *Kripasindhu v. Annadasundari* (4), the Bengal Tenancy Act is not a complete Code even in respect of the law of landlord and tenant; much less does it profess to incorporate the general principles of the law of contract and the doctrines of equity jurisprudence, in so far as they may have to be applied in the determination of disputes between landlords and tenants. In the second place, as pointed out by Lord Haldane, L.C. in *G. & C. Kreglinger v. New Patagonia M. C. S. Co.* (5), each case forms a real precedent only in so far as it affirms a principle, and the binding force of previous decisions, unless the facts are indistinguishable, depends on whether they establish a principle: "To follow previous authorities, so far as

(1) (1872) 19 W. R. 114 (117).

(2) (1896) 11 App. Cas. 541.

(3) (1907) 6 C. L. J. 621 (627).

(4) (1907) 6 C. L. J. 273; I. L. R. 35 Calc. 34; 11 C. W. N. 983.

(5) (1914) App. Cas. 85 (39).

they lay down principles, is essential, if the law is to be preserved from becoming unsettled and vague. In this respect, the previous decisions of a Court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in systems where the paramount authority is that of a Code. But, when a previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognized by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance."

As regards the decisions upon the construction of section 85 of the Bengal Tenancy Act, it is plain that a long line of cases affirm the view that a lease granted in contravention of section 85 (1) is operative as between the grantor and the grantee: *Madan v. Jaki* (1); *Gopal v. Eshan* (2); *Tamijuddi v. Asgar* (3); *Bipin Behari v. Amrita Lal* (4); *Arab Ali v. Rachimuddi* (5); *Ali v. Nayan* (6); *Abdul Karim v. Abdul Rahman* (7); *Janaki v. Prabhusini* (8); *Lani v. Muhammad* (9). The only case which supports the contrary view is the decision of Geidt J in *Basaratulla v. Kasi-runnessa* (10), which, so far as we have been able to discover, has not been followed in any subsequent decision. The conclusion as to the binding character of the lease as between grantor and grantee may be supported on one of two grounds, namely, *first*, that the validity of a lease granted in contravention of section 85 (1) can be questioned only by the landlord of the grantor or by the holder of a derivative title from him; or, *secondly*, that the doctrine of estoppel binds the grantor and grantee equally and debars each from disputing the validity of the lease to the detriment of the other. The first of these principles has not been universally accepted and is possibly in conflict with the rule enunciated in *Jarip Khan v. Dorfa Bewa* (11), and *Telam v. Adu* (12). These cases, however, do not

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(1) (1902) 6 C. W. N. 377.

(2) (1901) I. L. R. 29 Calc. 148.

(3) (1903) I. L. R. 36 Calc. 256; 13 C. W. N. 183.

(4) (1903) 9. C. L. J. 76.

(5) (1911) 13 C. L. J. 656.

(6) (1903) 15 C. L. J. 122.

(7) (1911) 15 C. L. J. 672.

(8) (1915) 22 C. L. J. 99; 19 C. W. N. 1077. (9) (1915) 20 C. W. N. 948.

(10) (1906) 11 C. W. N. 190.

(11) (1912) 16 C. L. J. 144; 17 C. W. N. 59. (12) (1913) 17 C. W. N. 468.



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affect the authority of the decision in *Manik v. Bani* (1), which was followed in *Gonesh v. Thanda* (2), by Fletcher & Richardson, JJ. on 22nd July, 1914. It is not necessary for our present purpose to make a choice between the two classes of cases, one of which places a limited construction on section 85 and holds it to have been enacted for the benefit of the superior landlord, while the other places a wider construction upon the section and allows a stranger to avail himself of its provision to defeat the title of a grantee who had not obtained possession before or after the grant. Apart from the conflict on this point, there is no serious doubt as to two propositions, namely, *first*, that the title of a grantee, who can fall back upon prior possession as tenant or otherwise, cannot be defeated by mere proof of contravention of section 85, and, *secondly*, that, as between grantor and grantee, the rule of estoppel applies, when the elements essential to attract its operation are proved to exist. In the case before us, as we have already explained, the defendants are precluded by the doctrine of estoppel from asserting that their obligations are other than those set out in the lease of the 27th August, 1896, on the strength whereof they obtained possession from their grantors. In this view, the decree of the Subordinate Judge cannot be supported.

We have finally to consider the question of the measure of damages. The defendants dispute only the first two items claimed by the plaintiffs. The first item must obviously be disallowed; the plaintiffs cannot claim the value of the property lost to them as also the sale-proceeds which simply represent the property transformed into money. As regards the second item, the claim is clearly excessive. As between the plaintiffs and the defendants, the property may be deemed to be a tenure; but the only reliable evidence as to the market value of a permanent tenure, which comes from the side of the defendants, is, that it sells for 13 years purchase. As the net profit derivable by the plaintiffs was Rs. 150 a year, the value cannot be estimated at a higher figure than Rs. 1950. The appeal will consequently be allowed, and the plaintiffs will have a decree for Rs. 4318 with interest thereon at 6 per cent. per annum from the date of the institution of the suit to the date of realisation. The plaintiffs will also have their costs, in proportion to the sum decreed, both here and in the Court below.

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*Appeal allowed.*

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| <p>In 1894 one N. M. a part proprietor of an estate, entered into an agreement with his co-proprietor the respondent under which the latter was appointed agent for the purpose of collecting rents and profits from the estate, in order gradually to pay off a heavy debt, rendering accounts of his management to N. M., who died in July 1899 leaving three sons, two of whom were minors. For about two years after the death of N. M., the respondent continued to manage the estate as before. The agency was terminated by a notice dated the 16th January 1902. In September 1904 the three sons sued the respondent claiming an account for the whole period of the agency. The Subordinate Judge ordered an account from Sraban 1303 B. S., to Magh 1308, B. S. (July-August 1896 to 16th January 1902), but the High Court on respondent's appeal limited the account to five months, Bhardra to Magh 1308 B. S. :</p> <p><i>Held</i>, that in the absence of any cross-appeal to the High Court or of any memorandum such as is required to be filed under section 561 of the Code of Civil Procedure, 1882, it was not competent for the plaintiff to get in this appeal any further remedy than the restoration of the order of the Subordinate Judge, and, that, having regard to the fact that it was not contended that after the death of N. M. the position of the respondent was altered or that he became trustee in place of an agent, Art. 89 of Sch. II of the Indian Limitation Act, applied and the order of the Subordinate Judge should be restored.</p> <p><i>Held</i>, also, that inasmuch as the two plaintiffs who were minors did not come of age until after suit and the appellant who was of age was not capable of giving a discharge which would bind the two minors, section 8 of the Indian Limitation Act 1877, did not apply.</p> <p>The High Court acting on paragraph 3 of the plaint held, that from its language the Court must suppose that demands were going on as long as the business was in existence, although the dates of the demands were not given or proved :</p> |       |

**Account—(Contd.).**

*Held*, that there was nothing in the pleading which would justify the inference which the High Court had drawn, and in the absence of evidence no such inference could probably be drawn adversely to the claim of the plaintiffs. **Nobin Chandra Barua v. Chandra Madhab Barua** ...

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**Accounts, suit for—Provincial Small Cause Courts Act, Schedule II, Art. 31—Small Cause Court, jurisdiction of—Suit, nature of.**

A suit for recovery of a certain sum of money on the allegation that upon settlement of accounts the amount would be found due from the defendant, was instituted in the Court of Small Causes :

*Held*, that it was a suit for accounts within the meaning of Art. 31 of the Second Schedule of the Provincial Small Cause Courts Act, and that treated as such it was beyond the jurisdiction of the Court of Small Causes.

*Held further*, that the true nature of a suit cannot be altered by the form in which the claim is laid in the plaint ; the matter is essentially one of substance. If in the order to grant relief to the plaintiff, it is necessary to take accounts, the suit is one for accounts within the meaning of Art. 31, although the plaintiff may have chosen to put a definite money value upon his claim.

Whether a suit is one for accounts within the meaning of Art. 31 must depend upon the relation in which the parties stand to each other, and the nature of the investigation required to afford relief to the plaintiff.

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| No appeal lies to the High Court against an order passed by a District Judge in execution of a decree passed in a suit instituted by a landlord for the recovery of rent, where the amount claimed in suit did not exceed |     |     |     |     |          |

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₹. 500 hundred rupees, and the order did not decide any of the special questions referred to in section 153 of the Bengal Tenancy Act. **Kumar Prafulla Krishna Deb v. Nosibannessa Bibi** ... 331

— *Right to appeal by a person not challenging the finding against him—His right to maintain the appeal—Suit for a declaration of title to immovable property by a person in possession—Finding against defendant's plea of adverse title.*

In a suit for a declaration of title to immovable property by a plaintiff in possession, by virtue of a deed of gift executed by a Hindu widow with the consent of the reversioners, the Court of first instance found against the title set up by the defendant on the strength of a will executed by the husband of the Hindu widow, held also that the will set up was never executed and the deed of gift was genuine and decreed the suit. The defendant then appealed but at the hearing of the appeal he only contested the genuineness of the deed of gift but he did not dispute the correctness of the finding of the lower Court as to the alleged will.

*Held*, that the suit being not for the ejectment of a defendant who was in possession, but only for declaration of title by a plaintiff who was in possession, it was not for the plaintiff to prove a better title in himself to the possession of the property than the title of the defendant.

*Held also*, that the defendant not having contested the decision of the first Court as to the genuineness of the will set up by him before the appellate Court and the first Court having found that the defendant had no title, the plaintiff appellant was to succeed and the defendant had no right to contest the declaration in favour of the plaintiff. **Chandrika Bakhsh Singh v. Raja Indar Bikram Singh** ... 291

— *Suit for rent—Bengal Tenancy Act (VIII of 1885) section 153(b)—Question of conflicting title not decided by primary Court—Appeal if lies to the first appellate Court—First appellate Court deciding question of conflicting title—Second appeal.*

No appeal lies from a judgment passed by a Judicial Officer specially empowered by the local Government to exercise final jurisdiction under section 153 Bengal Tenancy Act, when none of the special questions mentioned in the section and in controversy between the parties has been actually decided by him.

In a suit for rent valued at less than Rs. 50, the defendant pleaded that the plaintiff was his benamdar. The Munsiff, who was empowered to exercise final jurisdiction under section 153 Bengal Tenancy Act, dismissed the suit on the ground that the plaintiff failed to prove realization of rent from the defendant in previous years without determining the question of title. Against that decision an appeal was preferred to the District Judge and an application for revision was also made to him in the alternative. The District Judge held that the appeal was competent and decreed the suit on the merits :

**Appeal—(Contd.).**

*Held*, that although no appeal lay from the primary Court to the first appellate Court, a second appeal lay from the latter Court to the High Court.

*Per Sanderson, C. J.*—A second appeal lay to the High Court as a question of conflicting title within the meaning of section 153 Bengal Tenancy Act was decided by the District Judge.

*Per Mookerjee, J.*—A second appeal lay to the High Court in accordance with the principle that where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction.

As the appeal to the first appellate Court was incompetent, the High Court sent the case back to the District Judge to deal with the application under the proviso of section 153 Bengal Tenancy Act. *Kalpada Karmakar v. Shekhar Basini Dasya* ... ..

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—, right of, by a person not challenging the finding against him—His right to maintain the appeal—Suit for a declaration of title to immovable property by a person in possession—Finding against defendant's plea of adverse title; *See Appeal* ... ..

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— to Privy Council—*Civil Procedure Code (Act V of 1908), Sec. 110, para. 2*—Property in dispute, value of—Valuation, how to be determined—Valuation in the plaint, whether estops the plaintiff—Admission, if rebuttable.

Under the second paragraph of section 110 of the Code of Civil Procedure, the date of the decree or final order from which the appeal to His Majesty in Council is to be made is the material date, and as such the valuation of the property at the date of the institution of the suit is immaterial.

The fact that the plaintiff valued his suit in the Court of the first instance at a sum less than Rs. 10,000 and paid Court-fees accordingly, does not debar him from raising the point that the property which is in dispute in the appeal to his Majesty in Council is in fact valued at more than that sum. At the most it could only be taken as an admission, and it was one that might be rebutted by subsequent evidence. *Surendra Nath Roy v. Dwarka Nath Chuckerbutty* ... ..

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— to Privy Council—Subject matter of appeal, method of valuation—Value of land mortgaged or value of mortgage; *See Mortgage suit* ...

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Appellate Court—*Civil Procedure Code (Act V of 1908), O. 41 r. 27*—Additional evidence, produced after arguments heard—Admission of such evidence by the appellate Court, if proper—Reasons not recorded for admission of the evidence, effect of.

An appellate Court ought not to admit in evidence documents produced by a party after the appeal has been heard, arguments have been addressed, and judgment has been reserved, inasmuch as the other party thereby

**Appellate Court—(Contd.).**

gets no opportunity of rebutting the evidence contained in the documents, and his pleader also has no opportunity of arguing the effect of them.

The judgment of the appellate Court is also to be set aside where no reason has been accorded for the admission of the additional evidence as required by order 41 rule 27 of the Code of Civil Procedure. *Gajadhar*

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**Application—Civil Procedure Code (Act V of 1908), O. IX, Rr. 4, 9 and O. XLVII, r. 1.—Application for restoration—Alternative prayer for review—Provincial Small Cause Courts Act (IX of 1887), Sec. 17—Deposit of security.**

A suit was dismissed for the plaintiff's default in the presence of the defendant. The plaintiffs then made an application under O. IX rules 4 and 9 for restoration and rehearing. Again there was a default and the case was dismissed in the presence of the defendant. The plaintiffs then again applied for restoration under O. IX, rule 9 with an alternative prayer for treating the application as an application for review :

*Held*, that an application for the restoration of a case under O. IX, rules 4 and 9 may be treated as an original application which has to be numbered as a separate miscellaneous case and decided upon evidence on the merits.

*Held further*, that O. XLVII, r. 1 of the Code of Civil Procedure applies to all orders of the Court which may be reviewed under certain circumstances.

The provisions of section 17 of the Provincial Small Cause Courts Act with regard to deposit of security have no application to a miscellaneous application of this kind. *Bejn Behari Shaha v. Abdul Barik* ... 446

— for restoration of a case—Alternative prayer for review—Civil Procedure Code, O. 9, Rr. 4, 9, O. 47, R. 1 ; *See* Application ... 446

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| ————— Sec. 106—Revenue officer, jurisdiction of—Suit for declaration of title and for recovery of possession ; <i>See</i> Bengal Tenancy Act, Secs. 106, 109 ... ..                                    | 79    |

#### Secs. 106, 109.

Suits for declaration of title and for recovery of possession are entirely foreign to the jurisdiction of the Revenue officer under Sec. 106, of the Bengal Tenancy Act, his work being limited to entries in the record of rights.

Section 109 of the Bengal Tenancy Act is a bar only in respect of matters which are legally the subject matter of the investigation made under

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| The ingredients essential for a conviction under section 504 of the Indian Penal Code are threefold, first, intentional insult, secondly, provocation therefrom, and, thirdly, intention that such provocation should cause, or knowledge that such provocation was likely to cause the person so insulted to break the public peace or to commit any other offence.    |     |
| Insult may be inferred not merely from the words used, but also from the tone and manner in which the words are spoken.                                                                                                                                                                                                                                                 |     |
| The law makes punishable an insulting provocation which under ordinary circumstances would cause a breach of the peace to be committed, even though in the particular case the person insulted does not commit a breach of the peace. <i>Jaykrishna Samanta v. King-Emperor</i> ... ..                                                                                  | 137 |
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| <b>Calcutta Improvement Act—Calcutta Improvement Act (V of 1911 B. C.), preamble, sections 2, 36, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 52, 68, 69, 78, 81, 82, 83, 84, 88, 89, 122, 123, 124, 125, 155, 156 and 160 and Schedule—Calcutta Municipal Act (III of 1899 B. C.), section 3 (37)—Land Acquisition Act (I of 1894), sections 6 (3) and 25—Indian Coun-</b> |     |

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*cils Act, 1861 (24 and 25 Vict. Ch 67), section 43—Recoupment—Taxation—Finance—Acquisition, by agreement—Acquisition, compulsory—Acquisition, abandonment of—Surplus land, disposal of—Affected—Lay out—Relay out—Providing building sites—Jurisdiction—Sanction, notification of—Duly framed and sanctioned—Street—Area—Suit, bar of—Civil Court, jurisdiction of—Trustees, powers of—Ultravires—Statutes, construction of—Executive authorities—Legislature, delegation by, to executive—Improvement scheme.*

The Calcutta Improvement Act does not authorize the Trustees to acquire land compulsorily for the purpose of recoupment. Section 69 is the only provision in the Act for compulsory acquisition and under that section land can be compulsorily acquired only for carrying out any of the purposes of the Act. Recoupment is not one of the purposes of the Act which are enumerated in the Preamble and are formulated in detail in sections 36, 39 and 52.

Sections 41, 42, 78, 81, 122 and 123 do not by necessary implication authorize the compulsory acquisition of land for recoupment.

Sections 41 and 42 specify matters which must or may be provided for, in an improvement scheme ; they do not confer a right to acquire land compulsorily.

Sections 78 and 81 treat of abandonment of acquisition of unnecessary land and disposal of superfluous land respectively ; neither section creates a right to acquire land compulsorily.

Sections 122 and 123 relate to methods of account and do not touch the question of right of compulsory acquisition for recoupment.

The trustees are not competent to initiate a street-scheme for one of the purposes mentioned in section 39 and specified in their resolution, and then proceed with the scheme as if they had assumed jurisdiction for a different purpose.

The area which is intended to be benefited by a street-scheme must be first determined under section 39, and then the scheme has to be drawn up with reference to the elements mentioned in section 40. The area so determined is larger than the land to be acquired for the execution of the improvement works.

The expression 'providing building sites' in section 39 means making it possible to use as building site land which cannot be now used as building site ; it does not mean buying up land already fit for building site, pulling down houses existing thereon and selling the land at a profit for erection of buildings.

The expression 'laying out or relaying out' in section 41(b) cannot apply to the entire land comprised in the area intended to be benefited by a street-scheme.

The expression 'Street' does not include the abutting lands on both sides and the houses thereon, as it does in the English Local Government Act, 1858 ; it has the same meaning as in section 3(37) of the Calcutta Municipal Act.

**Calcutta Improvement Act—(Contd.).**

The term 'affected' in section 42(a) means neither 'beneficially affected or improved in value' nor 'prejudicially affected or impaired in value', but signifies 'acted upon physically or materially.' Land is affected by the execution of an improvement scheme within the meaning of section 42(a) when by the construction of the improvement works, there is a physical interference, with any right, public or private, which the owner is entitled to exercise in connection with that property.

Section 49(2) does not bar the jurisdiction of the Civil Court to determine whether the Trustees have or have not acted in violation or excess of statutory authority. As sections 155 and 160 show, section 49 does not bar suits of all descriptions ; it merely shows that after the publication of the notification of sanction by the Local Government, it must be assumed that the scheme has been framed and sanctioned duly, that is, in conformity with the procedure prescribed by the Act.

Section 156 does not apply to a suit brought not because of an act done but for the purpose of an injunction to restrain an act threatened to be done.

The term 'acquisition' does not necessarily mean compulsory acquisition under the provisions of the Land Acquisition, Act ; sections 68 and 69 indicate the distinction between acquisition by agreement and compulsory acquisition.

In any concrete case, if the competence of the Board to compulsorily acquire land, is called in question, the test to be applied is, whether the land is proposed to be acquired for carrying out one or other of the purposes of the Act as indicated in the Preamble and developed in sections 36, 39 and 52.

Mode of construction of Statutes which confer on a corporation extensive powers of interference with private rights explained. Where the objects of the Statute do not obviously imply such an intention, it must be presumed that the Legislature does not desire to confiscate private property or to encroach upon private rights ; it is expected that if the Legislature intended to confer on the executive authorities unlimited powers of interference with private rights, it would manifest its intention plainly in express words, at any rate by clear and necessary implication.

Distinction between acquisition for recoupment and taxation for purpose of recoupment explained. When a proposed acquisition is abandoned on condition of periodical payment by the owner of a sum fixed in perpetuity or the payment in lump of the capitalised value thereof, a tax is in essence imposed on the land ; such a tax can be validly imposed only with the sanction of the proper authorities duly obtained under section 43 of the Indian Councils Act, 1861, and the statute imposing the burden must do so in clear and unambiguous language.

Proper use of judicial precedents explained ; they are of value only in so far as they enunciate principles. No useful purpose is served, when a question arises as to construction of an Act, by reference to judicial decisions on the meaning of other Acts which, though similar in scope and purpose, are couched in different terms and provide machinery of

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| —————, powers of—Order or consent of the Commissioner—Order or consent, if to be under the seal of the Municipality—Consent of the Chairman, if validates Act done by the Vice-Chairman—Bengal Municipal Act, Secs. 44, 45, 230, 271, 353. |     |

A report having been made by the outdoor inspector of a Municipality the accused was prosecuted under section 271 of the Bengal Municipal Act for having disobeyed a requisition under section 230 of the Act. In the remarks column of that report, which bore an eight-anna stamp, occurred a remark by the Chairman of the Municipality by which he submitted it to the District Magistrate with a recommendation to prosecute the party under sections 230 and 271 of the Act. The outdoor inspector was subsequently examined before the Magistrate. The accused was then convicted of the offence :

*Held* that, the Chairman of the Municipality was not in the position of the complainant, and the report could not be regarded as a petition of complaint, although it bore an eight-anna stamp.

*Held* also, it was clearly an order or consent by the Chairman as representing the Commissioners, within the meaning of section 353 of the Act, inasmuch as the sanction for prosecution of a public authority need not be under the seal of that authority.

**Chairman—(Contd.).**

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| <i>Held</i> further, that although in the case notice against the accused was issued on the authority of the Vice-Chairman, there was a sufficient compliance of the law as express consent of the Chairman was subsequently obtained as indicated in the remarks column aforesaid. <b>Chairman of Hooghly-Chinsurah Municipality v. Kristo Lal Mallik</b> ... .. | 57  |
| <b>Charge to Jury—</b> Indian Penal Code, Sec. 243, offence under ; <i>See</i> <b>Misdirection</b> ... ..                                                                                                                                                                                                                                                         | 400 |
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| _____, O. 21 R. 22—Omission to give notice—Proceeding, nature of ; <i>See</i> <b>Ejectment, suit for</b> ... ..                                                                                                                                                                                                                                                   | 523 |
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**Compensation—***Removal of fixtures by Calcutta Municipal authority—Whether payment of compensation is a condition precedent to such removal—Court by which claim to such compensation is cognisable—Whether before removal a suit will lie to declare right to compensation in case of removal—Calcutta Municipal Act (Bengal Act III of 1899) Secs. 341, 617, 618, 619.*

The Calcutta Municipal Act provides that the Corporation shall compen-

**Compensation—(Contd.).**

sate every person who suffers damage by the removal of fixtures erected before June 1, 1863.

The Corporation served J with notices under section 341 to remove certain structures and thereafter obtained orders from the Magistrate for their demolition, but took no steps to enforce those orders. J brought a regular suit in the Court of the Subordinate Judge against the Corporation claiming (1) declaration that the fixtures were erected before June 1, 1863, (2) declaration that she was entitled to compensation for the loss she would suffer by their removal, (3) declaration that the Corporation could not remove them till compensation was paid, (4) that the Court should fix the amount of the compensation, and (5) an injunction restraining removal till the compensation was paid :

*Held*, that on the true construction of section 341 (3), the assessment of compensation was not a condition precedent to the demolition of the structures.

*Held, also*, that Courts other than the Small Cause Court were, by section 617 debarred from fixing the compensation, and therefore as the suit sought relief under any but the first two heads, it was misconceived, but that J was entitled under section 42 of the Specific Relief Act, to a declaratory decree for the first two claims, the Corporation having denied her right to compensation until the hearing of the appeal against the decree of the Subordinate Judge. *Azeeza J. S. Joseph v. The Corporation of Calcutta* ... .. 498

**Complaint—Criminal Procedure Code, Sec. 4 (h)—False charge preferred to Police—No judicial investigation thereof by Court ; See Sanction to prosecute** ... .. 134

**Complainant—Report of outdoor inspector, bearing an eight-anna stamp—Remark of the Chairman ; See Chairman, powers of** ... .. 57

**Compromise—Civil Procedure Code (1882), Sec. 462—Plaintiff and defendant, both minors—Sanction on behalf of minor plaintiff—Compromise not binding on minor defendant—Leave of the Court—Joint contract, liability of a promisor.**

Where both the plaintiff and the defendant to a suit were minors and the suit having been compromised, the Court sanctioned the compromise on the application of the plaintiff's next friend :

*Held*, that the requirements of section 462 of the Code of Civil Procedure, 1882, had not been observed in protection of the minor defendant, and consequently the plaintiff could not enforce the compromise against him.

One of two joint promisors could not plead the minority and consequent immunity of the other as a bar to the promisee's claim against him.

*Jamna Bai Saheb Mohital Avergal v. Vasanta Rao Ananda Rao Dhybar* ... 74

**Compromise, if binding on minor defendant—Compromise of a suit wherein both plaintiff and defendant were minors—Sanction on behalf of minor plaintiff—Civil Procedure Code (1882), Sec. 462 ; see Compromise** ... 74

**Compulsory acquisition of land—Calcutta Improvement Act, Sec. 69 ; See Calcutta Improvement Act** ... .. 246

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| An order directing that the sentences in two different cases do run concurrently, is illegal.                                                                                                                                                                                                                                                                     |     |
| Section 35 (1) of the Code of Criminal Procedure authorises a court to direct that several punishments passed on an accused for two or more distinct offences do run concurrently only when such sentences have been passed on him at one trial. It is not competent to a court to give such a direction when the sentences have been passed in different trials. |     |
| Kamal Mandal v. King-Emperor                                                                                                                                                                                                                                                                                                                                      | 54  |
| Contempt of Court—Disciplinary powers, exercise of; <i>See</i> Legal practitioner                                                                                                                                                                                                                                                                                 | 190 |
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| Continuity of a transferable tenure, if affected by sub division or by consolidation; <i>See</i> Permanent tenure                                                                                                                                                                                                                                                 | 275 |
| Contract— <i>Proposal with a condition—Acceptance—Compliance with condition—Contract to bequeath a village—Specific performance—Practice—Special leave to Cross-Appeal.</i>                                                                                                                                                                                       |     |

Upon the marriage of the appellant in 1886, her great aunt, a childless Hindu widow, who had brought up the appellant from an early age and was anxious that though married the appellant should continue to live with her, agreed that if the appellant and her husband would reside with her she would (*inter alia*) make provision for the appellant by the purchase of unspecified immovable property for her. The appellant and her husband accordingly resided with the great aunt. In 1893 the great aunt bought a village in her own name, but, as she declared, for the appellant. As the title of the village was not taken in the appellant's name, her husband became dissatisfied and ceased to reside with the great aunt, who in October 1893 wrote to the appellant to the effect that the village had been purchased for her and would be transferred to her on the writer's death. The appellant and her husband thereafter resided with the great aunt until the great aunt's death in 1909:

*Held*, that the letter of October 1893 was a proposal with a condition which was accepted and there was thus a complete and binding contract in October 1893, and that there was compliance with the condition and the appellant was entitled to recover possession of the village.

In an appeal to the Judicial Committee by the plaintiff in a suit against three defendants upon a ground of action common to all three, a defendant who had not appealed from the decree of the Court of first instance, but had been made a respondent to an appeal by another defendant, and who was out of time for appealing to the Judicial Committee, was joined as a respondent and granted special leave to cross-



**Contract—(Contd.).**

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| appeal. Sri Raja Malraju Lakshmi Venkayamma Rao Bahadur v. Sri Raja Venkata Narasimha Appa Rao Bahadur ... ..                                                                                                                                                                                                                                                                       | 279 |
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| <b>Co-owner—Title, denial of—Joint possession—Ouster, what constitutes.</b>                                                                                                                                                                                                                                                                                                         |     |
| Where the defendants, who appeared to be co-sharers of the plaintiffs as regards the land in dispute, had all along been denying the title of the plaintiffs, and setting up the interest of a third party, and asserted that they had been in possession of the land under that person :                                                                                           |     |
| <i>Held</i> , in a suit for recovery of possession of the land upon declaration of title, that the plaintiffs were entitled to a decree for joint possession.                                                                                                                                                                                                                       |     |
| <i>Per Mookerjee, J.</i> :— <i>Prima facie</i> , co-owners are entitled to hold joint possession of joint property; consequently, if one co-sharer seeks to defeat the claim of another co-sharer to joint possession of joint property, special circumstances must be alleged and established so as to justify exclusive occupation of the joint property by one of the co-owners. |     |
| A co-sharer who has been ousted from joint property is entitled to recover joint possession.                                                                                                                                                                                                                                                                                        |     |
| To constitute ouster a physical eviction is not essential; if a co-owner is in possession on behalf of or under an adverse claimant under such circumstances as to evidence a claim of exclusive right and title and a denial of the right of the other co-owners, there is an ouster in law.                                                                                       |     |
| The acceptance by the defendants of a lease of the disputed land from an adverse claimant, and their entry upon the land in assertion of the title so derived from the adverse claimant, should be deemed to be an ouster of their co-sharers, the plaintiffs. <i>Jatindra Nath Ray v. Sahidannessa Khatun</i> ... ..                                                               |     |
| ——, when can have exclusive occupation of joint property; <i>See</i> Co-owner ... ..                                                                                                                                                                                                                                                                                                | 165 |
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| Court-fee— <i>Court-fees Act (VIII of 1870), Sec. 7 (IV) (f)—Administration suit, nature of—Valuation for jurisdiction.</i>                 |     |

An administration suit by a creditor is an action for an account within the meaning of section 7 (IV) (f) of the Court-fees Act. In such a suit, the plaintiff is entitled to place his own valuation on the relief claimed and the valuation for purposes of jurisdiction is identical with the valuation for purposes of Court-fees.

An administration suit is in essence for an account and application of the estate of the debtor for the satisfaction of the dues of all the creditors ; the whole administration and settlement of the estate are assumed by the Court, the assets are marshalled, and the decree is made for the benefit of all the creditors. Creditors other than the plaintiff, may come in under the decree and prove their debts and obtain satisfaction of their demands, equally with the plaintiff in the suit, and, under such circumstances, they are treated as parties to the suit. If they decline so to come in, they will be excluded from the benefit of the decree, and yet they will, from necessity, be considered as bound by the acts done under the authority of the Court. Creditors, who have obtained decrees on their claims, should not be formally joined as plaintiffs, unless, it was alleged and proved that their interests would be in serious jeopardy, if the plaintiff had the conduct of the proceedings.

But where one creditor sues on behalf of himself and the others for administration of the estate of the debtor, the defendant may, at any time before judgment, have the action dismissed on payment of the plaintiff's debt and all the costs of the action. *Sasi Bhushan Bose v. Maharaja Manindra Chandra Nandy...*

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*Court-fees—Difficiency of—Civil Procedure Code, Secs. 148, 149—Court's discretion—Discretion, if may be challenged in appeal.*

A Judge passing orders under section 149 of the Code of Civil Procedure for payment of deficit Court-fees, must be taken on the record as it stands to have exercised his discretion as provided by the section : and an appellate Court cannot go into the question as to whether he exercised his discretion in making the various orders of payment. *Priyanath Bachher v. Meajan Sardar*

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*Court-fees Act, Sec. 7 (IV) (f)—Action for account—Administration suit by creditor ; See Court-fee*

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*Covenant, deed of—Right in immovable property not intended to be transferred—Device for deceiving creditors—Covenant, effect of ; See Limitation*

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—, effect of—Right in immovable property not intended to be transferred—Device for deceiving creditors ; *See* Limitation

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— for re-entry upon an involuntary sale, if valid ; *See* Ejectment

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| _____, Sec. 35(1), scope of ; See Concurrent sentences ...                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 54    |
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| _____, Sec. 147—“ <i>Right of use of any land</i> ”— <i>Right to collect tolas, dispute as to—Criminal Procedure Code, Sec. 147, scope of.</i><br>A dispute as regards a right to collect <i>tolas</i> (small perquisites) from a <i>hat</i> on one day every year, is one concerning the <i>right of use of any land</i> within the meaning of section 147 of the Code of Criminal Procedure.<br>The words used in section 147 are of wider and more general application than those in section 145 of the Code. <i>Sarat Chandra Madak v. Mobarak Mullik</i> ... ..                                                                                                                                                                                                                                                                                                                                            | 437   |
| _____, Sec. 195 (1) (b)—False charge preferred to Police—No judicial investigation thereof by Court ; See Sanction to prosecute ...                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 134   |
| _____, ( <i>Act V of 1898</i> ) Sec. 247, 438—Complainant, non-appearance of, though present in Court—Transfer of the case, complainant not aware of— <i>Penal Code (Act XLV of 1860), Sec. 426.</i><br>On a complaint, the accused was summoned for trial under section 426 of the Indian Penal Code. On the date of hearing both parties appeared with their witnesses before the Deputy Magistrate who, however, transferred the case to another Bench of Magistrates. Later on in the day the case was taken up by that Bench but the complainant, though he was present in the Court with his witnesses, could not appear as he was not aware of the transfer of his case. The Magistrates acquitted the accused under section 247 of the Code of Criminal Procedure :<br><i>Held</i> , that section 247 of the Code of Criminal Procedure does not apply in such a case. <i>Elim Haji v. Hamid</i> ... .. | 444   |
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**Cross-Examination—(Contd.).**

establishing the claim against the estate of the insolvent. The cross-examination held in contravention, should be eliminated from the record.

The notes of the public examination of the insolvent, though admissible against him under section 27 (6) of the Presidency Towns Insolvency Act, cannot be used against a creditor who had no opportunity to cross-examine him. *Jarwa Bai v. Ptambar Nilambar Shah* ... ..

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**Declaratory Suit**—Plaintiff in possession of immovable property—Plaintiff, if to prove better title in himself to possession than that of the defendant ;

*See Appeal* ... .. 291

— suit, if maintainable—Suit, if lies, before removal of fixture, to declare right to compensation in case of removal ; *See Compensation* ...

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**Decree, assignment of, how effected**—Civil Procedure Code (1882), Sec. 232 ;

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—, conditional, execution of—Condition to be observed ; *See Ejectment, suit for* ... ..

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—, execution of—*Attachment of debt payable outside jurisdiction—Attachment, effect of—Money paid under an illegal order, where to be refunded.*

It is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of that Court.

When a Court has manifestly usurped jurisdiction and has illegally secured possession of a fund, which should not have come under its control, its orders must be discharged. Such illegal orders cannot stand on the plea that possibly similar orders would have been made by a Court of competent jurisdiction.

The money which has been paid out of Court under an illegal order made without jurisdiction, must be brought back into Court. *Surendra Nath Goswami v. Bangsibadan Goswami* ... ..

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—, execution of—Decree for ejectment, incapable of execution ; *See Ejectment, suit for* ... ..

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—, execution of—*Decree, validity of, if can be raised in execution—Judgment against a lunatic—Lunatic not represented by a legal guardian.*

Every order and judgment, however erroneous, is good, until discharged or declared inoperative and the execution Court cannot enquire into the validity or propriety of the decree.

A proceeding to enforce a judgment is collateral to the judgment, and, therefore, no enquiry into its regularity or validity can be permitted in such a proceeding. Hence a judgment against a person who was *non compos mentis* at the time of the trial, and yet was not represented by a legal guardian, is not to be impeached in execution, but should be reversed or annulled in some direct proceeding taken for that purpose.

*Kalpada Sarkar v. Hari Mohan Dalal* ... .. 375

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**Decree—(Contd.).**

*from several judgment-debtors, effect of—Uncertified payment—Execution Court, if can investigate fact of payment.*

An application was made by a decree-holder for leave to bid at the sale which had been advertised. In this application, which was granted by the Court, it was stated that when the properties would be put up for sale, it would be necessary for the decree-holder to make a purchase for the decretal amount, if no other purchaser offered any bid, and it was prayed that permission might be granted in that behalf :

*Held*, that the application was not an application to the proper Court to take a step in aid of execution of decree.

Where the decree-holder accepted sums tendered by the different judgment-debtors from time to time and undertook not to proceed with execution against those judgment-debtors, but did not release them from liability under the decree :

*Held*, that the decree could be executed against all the judgment-debtors.

It is not open to an execution Court to investigate the fact of receipt of decretal amount by the decree-holder which was not certified to the Court by the judgment-debtor within the prescribed time. *Jogendra Prosad Mitra v. Asutosh Goswami* ... .. 462

—, if can be executed against all judgment-debtors—Decree-holder accepting sums tendered by different judgment-debtors from time to time and undertaking not to proceed against them—Release ; *See* Decree, execution of ... .. 462

—, validity of, if can be raised in execution ; *See*, Decree, execution of ... 375

— against one of the heirs of tenant, if maintainable ; *See* Rent, suit for... 371

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| <b>Diluvion</b> — <i>Jote, total extinction of—Kabuliat—Tenant, if liable to pay rent.</i>                                                                                                                                                                                                                                                                                                                                                                                                      |     |
| Rent is paid by a tenant for the use of land, and if for no fault of his own, the lands are washed away, he cannot, on general principles, be held liable to pay rent.                                                                                                                                                                                                                                                                                                                          |     |
| A kabuliat contained a stipulation to the effect—"cultivation or non-cultivation, profit or loss in respect of the jote shall be ours. We shall not be competent to make any objection to the rent settled ;"                                                                                                                                                                                                                                                                                   |     |
| <i>Held</i> , that the lessees thereby agreed not to make any objection to pay rent only on the grounds stated, <i>viz.</i> , non-cultivation, and similar grounds which pre-suppose the existence of the lands, and not where the lands are entirely washed away ; and as such they were not precluded by the terms of the kabuliat from pleading non-liability to pay rent if all the lands of the jote were washed away. <i>Rajendra Kumar Roy v. Maharaja Manindra Chandra Nandi</i> ... .. | 162 |
| <b>Disciplinary action of Court</b> , object of ; <i>See</i> Legal practitioner ... ..                                                                                                                                                                                                                                                                                                                                                                                                          | 190 |
| <b>Dispute as to right to collect <i>tolas</i></b> —'Right of use of any land' ; <i>See</i> Criminal Procedure Code, Sec. 147 ... ..                                                                                                                                                                                                                                                                                                                                                            | 437 |
| <b>Disqualified proprietor</b> — <i>Oudh Law—Revenue Act (Act XVII of 1876), section 174—Court of Wards—Decree on a contract entered into by a disqualified proprietor whilst his property was under the charge of the Court of Wards—Such property even after its release not liable to be taken in execution of such a decree.</i>                                                                                                                                                            |     |
| Under section 174 of the Oudh Land-revenue Act the property of a disqualified proprietor even after it is released from the custody of the Court of Wards is not liable to be taken in execution of a decree made in respect of a contract entered into by the ward while his property was under the superintendence of the Court. <i>Raja Debi Bakhsh Singh v. Shadi Lal</i> ... ..                                                                                                            | 15  |
| <b>Document appointing a disqualified person Mohunt, if valid ; <i>See</i> Religious endowment</b> ... ..                                                                                                                                                                                                                                                                                                                                                                                       | 116 |
| —— insufficiently stamped—Person putting the stamp knows of the insufficiency ; <i>See</i> Stamp Act, Sec. 64 cl. (c) ... ..                                                                                                                                                                                                                                                                                                                                                                    | 441 |
| <b>'Document of title' to goods</b> —Test to be applied ; <i>See</i> Railway receipt ...                                                                                                                                                                                                                                                                                                                                                                                                        | 320 |
| <b>'Document showing title', 'document of title' and 'instrument of title', meaning of in Indian Contract Act ; <i>See</i> Railway receipt</b> ... ..                                                                                                                                                                                                                                                                                                                                           | 320 |
| <b>'Document showing title' to goods</b> —Test to be applied ; <i>See</i> Railway receipt ...                                                                                                                                                                                                                                                                                                                                                                                                   | 320 |
| <b>Drain vesting in the Corporation</b> , effect of ; <i>See</i> House drain ... ..                                                                                                                                                                                                                                                                                                                                                                                                             | 358 |
| <b>Ejectment</b> — <i>Lease for a term—Option of renewal—Option not exercised—Holding over—Notice to quit, effect of—Landlord and Tenant Procedure Act (VIII B. C. of 1869), Sec. 53.</i>                                                                                                                                                                                                                                                                                                       |     |

**Ejectment—(Contd.).**

On the determination of a lease for a term, the lessee is bound to surrender possession to the lessor; on default, he may be ejected without notice, for though he entered into the land with right, he has remained without right, as the tenant cannot be said to hold over, unless the landlord assents to the continuance of his possession.

The assent of the landlord to the continuance of the occupation of the tenant after expiry of the term may be indicated by acceptance of rent or by conduct which justifies an inference to that effect.

The fact that the landlord tolerates the continuance in occupation of the tenant after the expiry of the term, does not make his former tenant, his tenant in future.

The serving of notice to quit, on the person who continues in occupation after the expiry of the term, does not make him a tenant whose tenancy is to be terminated by a notice to quit.

The defendant took a lease of the disputed land in the district of Sylhet from the plaintiff for a term of 3 years from 13th April, 1904, till 12th April 1907. The lease provided expressly that the tenant would give up possession upon the expiry of the term and that, if he desired to continue as tenant, he would take a fresh lease. The term expired, but the defendant neither took a fresh lease nor made over possession of the land to the plaintiff. Notices were served on the 8th and 15th October 1910, asking the defendant to quit on the 13th April, 1911 :

*Held*, that the defendant ceased to be tenant upon the expiry of his term and was liable to be ejected in the manner prescribed by section 53 of the Landlord and Tenant Procedure Act. **Paramananda Singh v. Syjou Singh** ... .. 30

———— *Permanent lease—Covenant for re-entry upon an involuntary sale—Lease in perpetuity, if forfeitable—Mortgage—Sale in execution of mortgage decree—Auction-purcase, status of—Right of re-entry, where reserved and where not—Lessor, remedy of—Forfeiture, when takes place—Election by lessor—Bengal Tenancy Act (VIII of 1885), Secs. 155, 188, Sch. III. Art. 1—Forfeiture, effect of, on under-lease—Limitation Act (IX of 1908), Sch. I. Art. 142—Fractional landlord, suit by.*

*Per Curiam* : A covenant for re-entry by the landlord upon an involuntary sale is valid and operative in law.

*Per Sanderson, C. J.* : Where the execution sale is directly due to voluntary act of the lessees in the execution of a mortgage, and omission to pay the mortgage-debt, the assignment cannot be said to be *ad invitum*.

*Per Mookerjee, J.* : An involuntary alienation may in one sense be attributed to a remote act of the party, quite as much as a voluntary alienation. But this does not place a voluntary and an involuntary alienation on the same footing.

*Per Curiam* : Section 155 of the Bengal Tenancy Act being applicable only to a suit for the ejectment of a tenant who has forfeited his tenancy by breach of a covenant, cannot be invoked by a purchaser of a perma-

Ejectment—(*Contd.*).

ment tenure in execution sale, which was forfeited by a condition in the lease.

A suit against such a purchaser for ejectment is not governed by article 1 of schedule III of the Bengal Tenancy Act, but by article 142 of the first schedule of the Limitation Act.

Such a purchaser being a trespasser, can be ejected by a fractional landlord, and section 188 of the Bengal Tenancy Act has no application.

*Per Mookerjee, J.* ; A lease in perpetuity is forfeitable for breach of covenant, notwithstanding that it is permanent.

Where there is a covenant in the lease against alienation but no right of re-entry is reserved in the landlord, the remedy of the latter is either by way of injunction against an apprehended breach, or by recovery of damages for a breach already committed.

Where the lease reserves a right of re-entry, the landlord is not entitled to the reliefs by injunction or damages, but may at his choice treat the lease as forfeited and exercise his right of re-entry.

Where, however, the landlord indicates his election to take advantage of the forfeiture, the forfeiture takes effect from the moment of breach, namely, from the date of alienation. The election is not a condition precedent to the right of action but the institution of the suit itself is a sufficient manifestation of the exercise of the option of the lessor to treat the lease as determined.

Where the lessee has created an underlease or any other legal interest, if the lease is forfeited, then the underlessee or the person who claims under the lessee, loses his estate as well as the lessee himself, but if the lessee surrenders, he cannot, by his own voluntary act in surrendering, prejudice the estate of the underlessee or the person who claims under him. *Dwarika Nath Ray Choudhury v. Mathura Nath Ray Choudhury* ...

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—, *decree for*—*Appellate decree*—*Merger of original decree*—*Appeal dismissed for default*—*Decree, which, to be executed*—*Civil Procedure Code (Act V of 1908) O. 21 R. 22*—*Omission to give notice, effect of*—*Conditional decree, execution of*—*Notice, if necessary*—*Decree incapable of execution, objection as to*—*Events subsequent*—*Bengal Tenancy Act (VIII of 1885), Sec. 155*—*Tenancy continues how long*—*Time, extension of*.

The original decree is merged in the appellate decree whether the latter confirms, amends or reverses the original decree, and it is the appellate decree alone which can be executed : *Abdur v. Maidin* and *Chandra Kant v. Lakshman* referred to. But this doctrine cannot be applied where the appeal is dismissed for default.

Where an appeal against an original decree has been dismissed for default, the original decree is the decree to be executed.

The omission to give notice, as required by O. 21 R. 22 of the Code of Civil Procedure, is not a mere irregularity which makes the proceeding voidable, but is a defect which goes to the root of the proceeding and renders it void for want of jurisdiction.



**Ejectment—(Contd.).**

Such omission renders proceedings inoperative even though a stranger may have acquired title in course thereof.

Even where O. 21 R. 22 of the Code of Civil Procedure does not apply, the Court should issue a notice on the judgment-debtor and hear his objection, if any, before it grants execution of conditional decree on the *ex parte* statement of the decree-holder that the contingency contemplated has happened.

Where an *ex parte* order has been made to the prejudice of a litigant who has not been afforded an opportunity to be heard, the order is subject to the implication that it may be revoked at the instance of the party affected thereby and the Court has inherent power to give such directions as the justice of the case may require.

An objection that a decree for ejectment previously obtained, has become incapable of execution by reason of events subsequent, can be properly taken in execution of the decree.

The tenancy continues in operation till the failure of the tenant to comply with the decree made under section 155 of the Bengal Tenancy Act within the time prescribed thereby.

Section 155 of the Bengal Tenancy Act enables the Court to give the tenant relief on the footing that there shall be no forfeiture at all ; when relief is granted, the forfeiture is stopped *in limine*, so that there is no question of any destruction of an interest which has to be called into existence again.

It is competent to the Court to entertain an application for enlargement of time after the expiry of the period prescribed in the decree under section 155 of the Bengal Tenancy Act and even after the decree-holder has applied for execution.

Whether an order for extension of time should be made or not, depends upon the circumstances of the litigation, that is, upon the circumstances disclosed at the original trial and the events subsequent. *Syam Mandal v. Sati Nath Banerjee* .. .. .

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**Equitable mortgage—Deposit of title deeds—Written or oral bargain accompanying it—Notandum on the back of a Promissory note—Limitation of Security.**

Where documents of title deeds of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the documents, but where the documents of title are handed over accompanied by a bargain, the bargain must rule the scope of the security, and when the bargain is a written bargain, it, and it alone must determine what is the scope and the extent of the security.

Where a borrower deposited with the lender documents of title to immovable property and granted him a promissory note on the back of which there was a notandum signed by the parties which showed that a part only of the property was security for the loan :

*Held*, that the rights of the parties must be determined by the written

**Equitable Mortgage —(Contd.).**

|                                                                                                                                                                                                                                                          |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| agreement, the notandum, and that the equitable mortgage in favour of the lender extended only to the part of the property referred to in the notandum. <i>Pranjivandas Jagjivandas Mehta v. Chan Mah Phee</i> ...                                       | 314 |
| <b>Estoppel</b> —Landlord and tenant ; <i>See</i> Sub-lease ... ..                                                                                                                                                                                       | 541 |
| ——— Sale of a portion of occupancy holding—Original tenant remaining in possession as under-raiyat—Settlement by superior landlord of the holding—Original tenant, if estopped from denying settlement-holder's title ; <i>See</i> Rent, suit for ... .. | 113 |
| ——— Tenant, if can contest landlord's title after expiration of tenancy—Evidence Act, Sec. 116 ; <i>See</i> Landlord and tenant ... ..                                                                                                                   | 103 |
| ——— Tenant, if can contest landlord's title ; <i>See</i> Landlord and tenant ...                                                                                                                                                                         | 103 |
| ———, if to be reciprocal—Stranger, effect on ; <i>See</i> Sub-lease ...                                                                                                                                                                                  | 541 |
| ———, when applies—Grantor and grantee ; <i>See</i> Sub-lease ... ..                                                                                                                                                                                      | 541 |
| <b>Events</b> subsequent to institution of suit, if Court can take notice of ; <i>See</i> Pre-emption ... ..                                                                                                                                             | 140 |
| <b>Evidence</b> , additional, produced after arguments heard—Admission of such evidence, if proper ; <i>See</i> Appellate Court ... ..                                                                                                                   | 457 |
| <b>Evidence Act</b> , Sec. 68—Admission of execution of mortgage bond by the sole mortgagor—Attestation, proof of, if necessary, as against other parties not admitting execution ; <i>See</i> Mortgage ... ..                                           | 175 |
| ———, Secs. 115 and 116, if exhaustive ; <i>See</i> Landlord and tenant ...                                                                                                                                                                               | 103 |
| ———, Sec. 116—Tenant, if can contest landlord's title after expiration of tenancy ; <i>See</i> Landlord and tenant ... ..                                                                                                                                | 103 |
| ———, Sec. 137—Purchaser of part of insolvent's property, if proper or necessary party—Cross-examination by such person, effect of ; <i>See</i> Cross-examination ... ..                                                                                  | 149 |
| <b>Executing Court</b> , if can investigate fact of receipt of decretal amount by the decree-holder—Payment not certified by the judgment debtor within the prescribed time ; <i>See</i> Decree, execution of ... ..                                     | 462 |
| <b>Execution proceedings</b> —Order by the District Judge, if appealable—Rent suit valued less than Rs. 100—Order not deciding any special question referred to in Sec. 153 of the Bengal Tenancy Act ; <i>See</i> Appeal ...                            | 331 |
| <b>Fact</b> , question of—Trial Judge's finding, value of ; <i>See</i> Religious endowment ...                                                                                                                                                           | 116 |
| <b>Father's right</b> over children, if can be taken away ; <i>See</i> Guardianship ...                                                                                                                                                                  | 226 |
| <b>Fishery</b> , owner of—River changing its course—River flowing through a channel in which another has a right of fishery—Owner, if can share in the fishery in the United waters ; <i>See</i> Fishery right ... ..                                    | 158 |
| ———, owner of, of a river, when can follow the river when it changed its course ; <i>See</i> Fishery right ... ..                                                                                                                                        | 158 |
| ———, owner of, if can share in the fishery in the united waters—River, changing its course, flows through a channel in which another has a fishery right ; <i>See</i> Fishery right ... ..                                                               | 158 |
| <b>Fishery right</b> —River, changing its course—Fishery, owner of—New channel, fishery right in, belonging to another—Owner of the fishery, if entitled to follow the river.                                                                            |     |
| • The owner of the fishery of a river which has taken a new course and flows                                                                                                                                                                             |     |

**Fishery right—(Contd.).**

through a channel in which another has a right of fishery cannot, share in the fishery in the waters.

The solution of the question as to whether the owner of the fishery of a river is entitled to follow the river when it has changed its course lies mainly in the answer that can be given to the question whether or not the invading river has lost its identity. **Saroda Prasad Roy Chaudhuri v. Khaja Mahammad Yusuf** ... .. 158

**Fixtures, removal of, by Calcutta Municipal authority ; See Compensation** ... 493

———, removal of, by Calcutta Municipal authority—Payment of compensation, if a condition precedent to such removal : *See Compensation* ... 498

———, removal of, by Calcutta Municipal authority—Court by which claim to compensation is cognisable ; *See Compensation* ... 498

**Fraud, allegation of—Specific charge and strict proof, necessity of ; See Pleading** ... .. 335

**Fruits and flowers of trees, if include natural products of trees ; See Lease** ... 21

**General Clauses Act, Sec. 2 (i) (ii)—Number—Gender—Statutes, interpretation of ; See Legal practitioners** ... .. 382

**General Rules of the High Court, Part I, Chap. XI. Rules 18, 27** ... 382

**Goods, meaning of—Indian Contract Act, Secs. 2, 76 and 178—Goods includes certificates of shares.**

Documents which are certificates of shares are neither “goods” nor “documents of title to goods” within the meaning of section 178 of the Indian Contract Act.

*Per Sanderson C. J.* :—It is obvious from the phraseology of the section that the word “goods” was intended to refer to “goods” in the ordinary meaning of the word. **Lalit Mohan Nandy v. Haridas Mukherjee** ... 335

**Guardianship—Father's right, if can be taken away—Divorce suit—Appeal by wife—Adultery admitted—Costs of appeal.**

The Court though not precluded from making an order giving the divorced wife access to the children, is most reluctant to make such an order and never places the indulgence of the parents above the welfare of the children.

As a wife should not be precluded by want of means from establishing her case, either as a petitioner or respondent, the husband should make a deposit or give security for the estimated costs that might be incurred by her. But if she, being herself found guilty, actively brings the matter before the appellate Court, her husband cannot be called upon, as a matter of right, to provide for her costs. The Court may, in its discretion, make an order in favour of the wife. **Beatrice Alice De Ste Croix v. Phillip De Ste Croix** ... .. 226

**High Court Rules, Appellate Side, Chap. XI, R. 4, scope of—Proceedings not in order ; See Limitation** ... .. 235

**High Court's power to remand for trial of issue—New issue in second appeal ; See Second appeal.** ... .. 296

**Hindu Law—Mitakshara—Joint family estate—Partition—Intention by one member to separate—Suit for partition by a member—Widow's right to continue suit after plaintiff's death.**

Under the Mitakshara law a definite and unambiguous indication by one member of a joint undivided family of his intention to separate himself and to enjoy his share in severalty will amount to partition if the intention is unequivocal and clearly expressed ; and it must depend upon the facts of each case whether partition is effected thereby.

The intention to separate may be evinced either by explicit declaration or by conduct, and if it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit.

The appellant's husband served a registered notice on the manager of the Mitakshara joint family of which he was a member saying in explicit terms that his desire was to get partitioned his share and asking the manager to partition the joint estate without delay. A few days thereafter the instituted the suit for partition.

*Held*, that nothing could be more unequivocal or more clearly expressed than the conduct of the appellant's husband in indicating his intention to separate himself and enjoy his share in severalty by the said notice coupled with the suit ; that those acts amounted to a separation with all its legal consequences ; and that on the death of the appellant's husband during the pendency of the suit the appellant inherited his share and was entitled to continue the suit. **Musammât Girja Bai v. Sadashiv Dhundiraj** ... .. 207

————— **Widow's estate—Position of reversionary heirs—Declaration of right—Reversioner not entitled to such declaration while the widow lives—Representative capacity of reversioner suing to prevent waste.**

A Hindu widow's right with respect to the estate of her deceased husband is of the nature of a right of property ; her position is that of owner ; her powers in that character are, however limited ; but so long as she is alive no one has any vested interest in the succession. While she is alive, it is futile to make a declaration who is the reversionary heir of her deceased husband which might be rendered valueless by the development of events.

A reversionary heir although only having a contingent interest is recognised by the Courts as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life ; but such heir thus appealing to the Court does so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion.

Where the respondent, a reversionary heir, sued for an injunction and for the appointment of a receiver alleging waste by the appellant, a widow, who denied that the respondent was the reversioner, and it was found that the charges of waste were unfounded, but the respondent was granted a declaration that he was the ; " next reversionary heir " under

**Hindu Law—(Contd.).**

cover of his prayer "for further relief." *Held*, that he was not entitled to such a declaration. **Janaki Ammal v. Narayanasami Aiyer** ...

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**Hindu widow—Legal necessity—Onus Probandi—Recitals in deeds—Weight to be attached to them as against third parties—Attestation of a deed does not by itself create estoppel against or imply consent of the attesting rever-sioner—Dilatory conduct of appeal to Privy Council—Costs.**

Where a Hindu widow, who is only entitled to the usufruct of her deceased husband's property, purports to dispose of his whole estate, the burden of proving that the disposition was made under the circumstances of legal necessity rests on the purchaser however great the lapse of time.

Recitals in a deed cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain.

Under ordinary circumstances and apart from statute, recitals in a deed of sale can only be evidence as between the parties to the conveyance and those who claim under them. Where a very long time has elapsed between the date of the deed and the institution of the suit challenging the sale, such recitals cannot be disregarded, although, on the other hand, no fixed and inflexible rule can be laid down as to the proper weight which they are entitled to receive. If the deed is challenged at the time or near the date of its execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts establishing legal necessity. But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance, and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then, when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, will be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time.

Necessity for maintenance of Hindu widows is a legal necessity but that maintenance need not be measured merely by a sufficient sum to support bare existence.

Attestation proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions. It can, at the best, be used

**Hindu widow—(Contd.).**

for the purpose of cross-examination, but by itself it will neither create estoppel nor imply consent.

Where there is considerable delay (delay of seven years in the present case) in setting down an appeal for hearing, a successful appellant will not be allowed costs unless he clears himself of the imputation of having needlessly protracted the proceedings. *Nandalal Dhur Biswas v. Jagat Kishore Acharjya Chowdhuri* ... .. 487

**Hindu widow's right as to her husband's estate ; See Hindu Law—Widow's estate** ... .. 309

**House drain—Calcutta Municipal Act (III B.C. of 1899), Sec. 286—Drain vesting in the Corporation, effect of.**

The fact that the drain is a house drain, made by the owner of the adjoining premises for the outlet of water therefrom, does not exclude it from the operation of section 286 of the Calcutta Municipal Act.

When a road or a drain vests in a Municipality, the effect is not to confer the full proprietary right in the soil itself covered by the road or the drain on the Commissioners.

The property of the local authority concerned does not extend further than is necessary for the maintenance and user of the highway as a highway ; subject to this qualification, the original owner's rights and property remain, and, if the highway ceases to be a highway, the owner becomes entitled to full and unabridged rights of ownership in the property.

*Gunendra Mohan Ghosh v. Corporation of Calcutta* ... .. 358

**Improvement scheme ; See Calcutta Improvement Act** ... .. 246

**Inherent power—Ex parte order ; See Ejectment, suit for** ... .. 523

**Injunction—Bengal Tenancy Act (VIII of 1885), section 23—'Rendering land unfit for the purpose of the tenancy'—Temporarily unfit—Release of a portion of the holding by a raiyat in favour of some of the landlords—Possession relinquished—Portion acquired for the purpose of holding market.**

Section 23 of the Bengal Tenancy Act is applicable not only to cases where the land is made permanently unfit, but also to cases where the land is made temporarily unfit for the purposes of the tenancy.

Defendants Nos. 1 to 3 held a certain non-transferable occupancy holding under the plaintiffs respondents and the other defendants appellants, as their landlords. The tenant defendants executed a deed of release in favour of the landlords defendants, to whom they also relinquished possession of one-tenth of the area of the entire holding (i.e. 2 bighas). The object of this release was to enable the landlords defendants to erect structures thereon and to hold a market on the site :

*Held*, that the plaintiffs were entitled to obtain an injunction to restrain the defendants from altering the character of the land.

That the defendants landlords, if they were permitted to execute their design, would render the holding unfit within the meaning of section 23 of the Bengal Tenancy Act, for agriculture, for which purpose alone the

**Injunction—(Contd.).**

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| land was let out to the tenants defendants. <i>Rajkishore Mondal v. Rajani</i>                                                                                                                                                                       |     |
| <i>Kant Chuckerbutty</i> ... ..                                                                                                                                                                                                                      | 85  |
| <b>Insult—Actual breach of peace ; See Breach of peace...</b>                                                                                                                                                                                        | 137 |
| ——, how to be inferred ; <i>See Breach of peace</i> ... ..                                                                                                                                                                                           | 137 |
| <b>Interest—Money, payment of, under decree, which was afterwards reversed on appeal ; See Restitution</b> ... ..                                                                                                                                    | 467 |
| <b>Jaghir tenure, if can be resumed—Zemindar's undertaking with respect to Sardars and Paiks—Paiks doing private and public duties—Land held by Paik having no connection with the police ; See Permanent Settlement</b> ... ..                      | 296 |
| <b>Jail Code, Rule 526, Exp. 1 ; See Concurrent sentences</b> ... ..                                                                                                                                                                                 | 54  |
| <b>Joint Contract—Promisor, liability of ; See Compromise</b> ... ..                                                                                                                                                                                 | 74  |
| —— possession, decree for—Suit for recovery of possession of land upon declaration of title—Defendant co-sharer of the plaintiff—Defendant denying the title of the plaintiff and setting up interest of a third party ; <i>See Co-owner</i> ... ..  | 165 |
| <b>Judge, trial, statement of, if conclusive ; See Misdirection</b> ... ..                                                                                                                                                                           | 400 |
| <b>Judgment, reversal of, effect of—Dependent judgment or order, effect on—Independent judgment or proceeding, being part of the same litigation, effect on ; See Restitution</b> ... ..                                                             | 467 |
| —— against a lunatic, not represented by a legal guardian, if can be impeached in execution proceeding ; <i>See Decree, execution of</i> ... ..                                                                                                      | 375 |
| —— or order, dependent, how determined ; <i>See Restitution</i> ... ..                                                                                                                                                                               | 467 |
| <b>Judicial precedents, proper use of ; See Calcutta Improvement Act</b> ... ..                                                                                                                                                                      | 246 |
| <b>Jurisdiction—Small Causes Court—Suit for recovery of money to be found due on settlement of accounts, from the defendant ; See Account, suit for.....</b>                                                                                         | 187 |
| —— of Civil Court, if barred—Trustees acting in violation or excess of statutory authority—Calcutta Improvement Act, Sec. 49 (2) ; <i>See Calcutta Improvement Act</i> ... ..                                                                        | 246 |
| —— of subordinate Courts to take proceedings under the Legal Practitioners Act ; <i>See Legal Practitioner...</i> ... ..                                                                                                                             | 190 |
| <b>Jury, non-direction to, if misdirection ; See Misdirection</b> ... ..                                                                                                                                                                             | 400 |
| <b>Kabuliat, construction of—Circumstances under which it was executed ; See Lease</b> ... ..                                                                                                                                                        | 21  |
| <b>Lambardar Gaontia, settlement by—Raiyati land, lease of—Lease, if valid—Central Provinces Land Revenue Act (XVIII of 1881) Sec. 138.</b>                                                                                                          |     |
| A <i>lambardar Gaontia</i> can grant a lease of <i>raiya</i> ti land without the approval of co-sharer <i>Gaontias</i> . <i>Sidheswar Panda v. Pitbas Gaontia</i> ... ..                                                                             | 83  |
| <b>Landlord forbearing to claim rent from an occupancy raiyat for 40 years—Presumption ; See Tenancy</b> ... ..                                                                                                                                      | 363 |
| —— and tenant—Landlord's right as against recorded tenant—Sale of a portion of occupancy holding ; <i>See Rent, suit for</i> ... ..                                                                                                                  | 113 |
| —— and tenant—Sale of a portion of occupancy holding—Original tenant remaining in possession as under-raiyat—Settlement by superior landlord of the holding—Settlement-holder, if landlord of the original tenant ; <i>See Rent, suit for</i> ... .. | 113 |

**Landlord and tenant**—*Tenant, if can contest landlord's title*—*Tenancy, expiration of*—*Possession*—*Estoppel*—*Indian Evidence Act (I of 1872), Secs. 115, 116, if exhaustive.*

According to the law of England a person who has been let into possession as a tenant is estopped from denying his lessor's title without first surrendering possession.

The position, however, is different when the tenant had possession before he took the lease.

*Per Mookerjee, J.*—Enjoyment by permission is the foundation of the rule, that a tenant shall not be permitted to dispute the title of his landlord. Two conditions are essential to the existence of the estoppel, first, possession, secondly, permission; when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues.

The above doctrine was also unquestionably the law in this country before the Indian Evidence Act was passed.

The law has not in this respect been altered by the Indian Evidence Act, and now, as before, a tenant who has been let into possession, is estopped from denying the landlord's title without first surrendering possession.

Sections 115 and 116 of the Indian Evidence Act are not exhaustive, and there may be rules of estoppel applicable other than what is contained in those sections.

Section 116 of the Act cannot imply that after the expiration of the tenancy, the tenant is free to dispute the title of the landlord, although he retains possession which he had obtained by the permission of the landlord. **Bhaiganta Bewa v. Himmat Bidyakar** ... ..

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—————*Tenant, if can contest Landlord's title*—*Adverse possession, title by*—*Lessee, if can acquire such title against his lessor*—*Non-payment of rent, if creates adverse possession.*

A tenant cannot dispute the landlord's title without first going out of occupation, and thereby making it clear that he intended to dispute the title of his landlord.

Where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor pending the term of his lease, unless he distinctly asserts such a title to his knowledge and gives him notice that he asserted such a title.

Failure to pay rent to the lessor by the lessee does not alone operate to create in favour of the lessee a title by adverse possession. **Reajuddi Bepari v. Chand Baksha Hajl** ... ..

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**Lease**—*Covenant against alienation*—*Right of re-entry reserved in the landlord*—*Forfeiture, effect of, on underlease*; *See Ejectment* ... ..

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———*Covenant against alienation*—*Right of re-entry not reserved in the Landlord*—*Landlord's remedy*; *See Ejectment*... ..

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———*Covenant against alienation*—*Right of re-entry reserved in the landlord*—*Forfeiture, when takes effect*—*Election not a condition precedent*; *See Ejectment* ... ..

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**Lease—(Contd.).**

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|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| —Covenant against alienation—Right of re-entry reserved in the land-lord—Landlord's remedy ; <i>See Ejectment</i> ... ..                                                                                                                                                                                                | 40  |
| —Surrender—Effect on underlease ; <i>See Ejectment</i> ... ..                                                                                                                                                                                                                                                           | 40  |
| — <i>Transfer of Property Act (IV of 1882), Sec. 8—Trees reserved by the lessor—Lessor, if can cultivate shellac on the trees—Fruits and flowers—Kabuliat, construction of.</i>                                                                                                                                         |     |
| In construing a <i>Kabuliat</i> it is permissible to look at the circumstances under which it was executed.                                                                                                                                                                                                             |     |
| A lessor reserved property in the trees growing on the lease-hold land and the lessee was prohibited from taking them away ; the latter was given enjoyment of the <i>phal phul</i> (fruits and flowers) of the trees only at the lessor's permission :                                                                 |     |
| <i>Held</i> , that this ownership did not carry with it a right to go on the lessee's land to cultivate shellac on trees reserved.                                                                                                                                                                                      |     |
| A transfer of property passes to the transferee the interest of the transferor unless a different intention is expressed or necessarily implied.                                                                                                                                                                        |     |
| <i>Per Sanderson, C. J.</i> : Fruits and flowers of the trees would in the ordinary meaning of the words include the natural products of the trees. <i>Rai Charan Mahanti v. Kanai Kumar</i> ... ..                                                                                                                     | 21  |
| —, permanent—Covenant for re-entry upon an involuntary sale—Mortgage, execution of, by lessee—Execution sale ; <i>See Ejectment</i> ... ..                                                                                                                                                                              | 40  |
| —reserving property in trees—Lessee given enjoyment of <i>phal phul</i> —Lessor, if can cultivate shellac on trees— <i>Transfer of Property Act, Sec. 8 ; See Lease</i> ... ..                                                                                                                                          | 21  |
| —for a term—Determination of lease—Lessee, duty of ; <i>See Ejectment</i> ... ..                                                                                                                                                                                                                                        | 30  |
| —for a term—Determination of lease—Lessee, if can be ejected without notice ; <i>See Ejectment</i> ... ..                                                                                                                                                                                                               | 30  |
| —for a term—Option of renewal—Option not exercised—Holding over, effect of—Landlord and Tenant Procedure Act, Sec. 53 ; <i>See Ejectment</i> ... ..                                                                                                                                                                     | 30  |
| Legal necessity—Necessity for maintenance of Hindu widow ; <i>See Hindu widow</i> ... ..                                                                                                                                                                                                                                | 487 |
| —necessity—Sale by Hindu widow—Burden of proof—Lapse of time ; <i>See Hindu widow</i> ... ..                                                                                                                                                                                                                            | 487 |
| Legal Practitioners— <i>Legal Practitioners Act (XVIII of 1879) sections 13, 14—Jurisdiction of Subordinate Courts to take proceedings under the Act—Inquiry by Subordinate Courts if valid—Misconduct in the presence of the Court, effect of—Misconduct, what amounts to—Contempt—Disciplinary action, object of.</i> |     |

Section 14 of the Legal Practitioners Act covers cases of misconduct under all the clauses of section 13 of the Act and as such a Court subordinate to the High Court is competent to enquire into a matter falling within the purview of any of the clauses of section 13, when the legal practitioner whose conduct is called in question practises in such Court.

The dictum of Hill J. in *In the matter of Purna Chandra Pal* commented on and disapproved.

**Legal Practitioner—(Contd.).**

The High Court is competent to take action under section 13 cl. (f) of the Legal Practitioners Act after such enquiry as it thinks fit and it is not required that the enquiry should be conducted directly by the High Court ; it may well be made by a Subordinate Court under the direction of the High Court, the only essential being that notice containing the charges should be given to the legal practitioner to shew cause against suspension or dismissal.

Misconduct in the presence of the Court which shows disrespect of its authority or which obstructs or has a tendency to interfere with the due administration of justice is contempt and thus disorderly conduct in the Court room is treated as contempt of Court. The Court is deemed present in every part of the place set apart for its use and for the use of its officers, jurors and witnesses and consequently misbehaviour in such places is misconduct in the presence of the Court.

A contempt may be of such a character as to warrant the exercise of the disciplinary powers of the Court.

*Held*, therefore, that the legal practitioner in the present case having used abusive language to an officer of the Court, and the same having been heard by the presiding Judge himself who was holding his Court in the room adjoining the office where the incident took place, misbehaved in the presence of the Court within the meaning of this Rule and as such the Court could take disciplinary action against him.

Where the Court takes notice of a misconduct which consists in the obstruction of or an interference with one of its officers, the object of the discipline enforced is not so much to vindicate the dignity of the Court or the person of the officer as to prevent undue interference with the administration of justice. In the matter of Rasik Lal Nag ...

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—*Women-Administration of Justice Regulation 1781, Secs. 46, 84—Regulation VII of 1893, Preamble, Secs. 2, 5—Regulation XXVII of 1814, Preamble, Secs. 3-5, 10-14, 18, 20-22, 30, 35, 37—Act I of 1846, Secs. 4, 12—Act XVIII of 1852—Act XX of 1853—Act II of 1857 (Calcutta University)—Act XLV of 1860 (Penal Code), Sec. 8—Act X of 1865 (Succession Act), Sec. 3—Act XI of 1865 (Small Cause Courts), Sec. 1—Act XX of 1865 (Pleaders) Secs. 2, 4, 5—Act XXIII of 1865 (Punjab Chief Courts), Sec. 1—Act XXIX of 1865—Legal Practitioners Act (XVII of 1879), Sec. 6—Statutes, interpretation of—Number—Gender—General Clauses Act (I of 1868), Sec. 2 (i), (ii)—General Clauses Act (X of 1897), Sec. 13—Statutory rules, construction of—General Rules of the High Court, Part I. Ch. XI, rules 18, 27—Solicitor's Act, 1843 (6 and 7 Vict. C. 73), Sec. 48.*

Under the Statute law of British India a woman though otherwise qualified, is not entitled to be enrolled as a legal practitioner. In the matter of

Regina Guha ... ..

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Legal Practitioners Act, Sec. 13 (f)—Procedure ; See Legal practitioner ..

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Legislation, delegation by, to executive ; See Calcutta Improvement Act ..

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| Lessor and lessee— <i>Lessee</i> , when can acquire title by adverse possession ; <i>See</i>                                 |     |
| Landlord and tenant     ...     ...     ...     ...                                                                          | 453 |
| ——— and lessee—Permanent lease—Covenant for re-entry upon an involuntary sale ; <i>See</i> Ejectment     ...     ...     ... | 40  |

Limitation—*Application for execution of decree—Step in aid of execution—“Proper Court” for execution—Indian Limitation Act (XV of 1877), Sch. II, Art. 179—Code of Civil Procedure (Act XIV of 1882) Secs. 223, 224, 228, and 230.*

Where a decree had been transferred by a District Court to a Munsiff's Court for execution by the latter Court, and had not been returned, and where a subsequent application for execution by sale of the property within the jurisdiction of the Munsiff's Court was made to the District Court :

*Held*, that, having regard to sections 223, 224, 228 and 230 of the Code of Civil Procedure, 1882, the proper Court to which the application should have been made was the Court of the Munsiff ; that the Court of the District Judge was not the proper Court ; and that the application to that Court was not a “step in aid of execution” available to keep the decree alive under Art. 179 of Sch. II of the Indian Limitation Act 1877. *Maharaja of Bobbili v. Sree Rajah Narasaraju*     ...     ...

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——— *Limitation, suspension of—Plaintiffs litigating for their rights in a previous suit wherein they were defendants.*

A Hindu of Calcutta died intestate leaving three sons B. M., M. M., and C. L., of whom the last named died in 1881 leaving sons. On and from the 18th January, 1892, B. M. collected the rents and issues of certain property to the exclusion of M. M., and the sons of C. L. On the 21st December, 1896 the sons of C. L. instituted a suit against B. M., and M. M. for their share in the property. In 1897 on the death of B. M., and M. M. their sons were brought on the record. The sons of M. M. supported the sons of C. L., and asked that their rights and interests might also be declared in that suit, and a distinct issue was framed in respect of their claim. The Court decreed the claims of the sons of C. L., and made a similar decree in favour of the sons of M. M. On appeal the decree in favour of the sons of C. L. was affirmed, but that in favour of the sons of M. M. was set aside on the 22nd February, 1904. Thereupon, on the 14th November, 1904 the sons of M. M. brought the present suit against the sons of B. M. and C. L. for their share in the said property :

*Held*, that limitation began to run against the plaintiffs on the 18th January 1892, but that it remained in suspense whilst they were *bona fide* litigating for their rights in the suit brought by the sons of C. L., and consequently the suit was not barred by limitation.

*Held*, that the appellate Court ought not to have set aside the decree in favour of the defendants, but ought to have exercised its powers under the Civil Procedure Code of 1882 by transposing them from the category of defendants to that of plaintiffs and thereby maintained the decree of the primary Court.

**Limitation--(Contd.).**

In cases where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came. If, however, owing to the distance of time it is hardly likely that evidence would be forthcoming on either side to establish or rebut conclusively the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts.

So long as a deed of covenant does not purport to transfer and is not intended to transfer any right in the immovable property comprised therein and is only resorted to as a device for deceiving creditors and sheltering the property dealt with thereunder from their reach, it will not alter the title of the covenantor to the property covered by it, even though it may contain a recital falsely acknowledging the right, which never existed, of the covenantee to the said property. Nor will such a deed be valid as a family settlement. *Srimati Nrityamoni Dassī v. Lakhān Chunder Sen* ... ..

————— *Limitation Act (IX of 1908), Arts. 116, 120 and 132 — Mortgage — Loan of Paddy.*

Where a loan was taken of paddy and was promised to be returned with interest in paddy, a suit to realize the value of the paddy due by sale of immovable properties given by way of security for the repayment of the loan is not governed by Art. 132 of the Limitation Act; either Art. 116 or Art. 120 applies. The suit cannot be treated as a suit to enforce payment of money charged upon immovable property. *Rashbihari Das v. Kunjabihari Patra* ... ..

————— *Limitation Act (IX of 1908), Sec. 14, cl. 2, explanations 1 and 2—Civil Procedure Code (V of 1908), O. VII, r. 10—Return of plaint—Permission to refile in proper Court—Order allowing further time—Court, power of—Suit, filing of—Last day—Plaintiff, risk of—Prosecution of a suit in a Court—Return of plaint, termination on.*

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The plaintiffs attached certain properties in execution of a decree against one of the defendants. Some of the other defendants also claimed the same properties and their claims were allowed on the 3rd of September, 1908. The plaintiffs brought this suit on the 2nd of September, 1909 in the Court of the Munsiff who had no jurisdiction to try the suit. On the 23rd of June, 1910 the Munsiff ordered the plaint to be returned for presentation in the proper Court and directed the plaintiffs to pay costs. The plaint was returned on the 27th of June, 1910 with the permission to refile it in the proper court within five days and an order fixing the amount of costs was recorded on the 30th June. The suit was refiled on the 1st of July 1910 :

*Held*, that the order allowing further time must be considered as a nullity.

*Held also*, that a plaintiff who files his suit on the very last date available to him under the law of Limitation, takes the risk and the law does not make any provision for extension of time except in cases coming under clause 2 of Sec. 14 of the Limitation Act.

**Limitation—(Contd.).**

*Held further*, that the return of the plaint terminates the connection of the Court with the plaint which it cannot entertain and though the costs were calculated later, the plaintiffs were not prosecuting the suit in the Court of the Munsiff after that Court had returned the plaint and the explanations to Sec. 14 of the Limitation Act cannot be read as extending the time excluded, beyond the time when the plaintiff may be said to have been prosecuting their suit. *Ganga Charan Das v. Akhil Chandra Shaha* ... ..

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—————*Review, application for—High Court judgment—Indian Limitation Act, section 12, High Court Rules, Appellate Side, Chap. XI, R. 4.*

The provision of section 12 of the Indian Limitation Act is applicable not only to appeals but also to an application for a review of judgment. Although a copy of the decree is not necessary to be attached to an application for review, in computing the period of limitation the time requisite for obtaining the copy of the decree shall be excluded and the period of limitation will not commence to run until at all events the day when the decree was signed by the Judges.

Rule 4 of chapter XI of the High Court Rules was intended to apply to the case where the Deputy Registrar gives a certificate that all the proceedings were in order and not to cases where the certificate of the Deputy Registrar was to the effect that the proceedings were not in order. *Kallpada Karmakar v. Shekhar Basini Dasya* ... ..

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—————*Sale for arrears—Assam Land and Revenue Regulation (I of 1886), sections 70, 80, 85—Person in adverse possession for less than statutory period, if a defaulter—Symbolical delivery of possession to purchaser, effect of, against such person—Sale certificate, if conclusive—Confirmation of sale, date of—Sale, when final—Limitation Act (IX of 1908) Sch. I. Art. 144.*

A person who had no interest in an estate was in adverse possession of lands really included in the estate which was sold under section 70 of the Assam Land and Revenue Regulation; he claimed those lands as situated within a neighbouring estate owned by him; his adverse possession had not at the time of the sale continued for the statutory period so as to ripen into ownership:

*Held*, that he was not a defaulting proprietor at the date of the sale and as he was a stranger to the proceedings for delivery of possession, the symbolical delivery could not avail against him.

What is stated in the sale certificate as the date of confirmation of sale cannot operate in law as the date when the sale became final under section 80 of the Assam Land and Revenue Regulation. *Jitendra Kumar Pal Chowdhury v. Mohendra Chandra Sarma* ... ..

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—————*Suit against purchaser in execution sale of permanent tenure—Permanent tenure forfeited by a condition in the lease—Bengal Tenancy Act, Sch. III. Art. I.—Limitation Act, Sch. I. Art. 142; See Ejectment*

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| Limitation, when begins to run—Person receiving money under decree, which was afterwards reversed on appeal ; <i>See</i> Restitution ... ..                                                                                                                                                                         | 467 |
| — Act (1877) Sec. 8 and Sch. II. Art. 89—Demand—Discharge—Minority of some of the claimants to an account ; <i>See</i> Account, suit for ... ..                                                                                                                                                                     | 509 |
| —, Sch. II. Art. 179—Step in aid of execution—Application for execution by sale of property within the jurisdiction of the Munsiff's Court made to the District Court—Decree transferred by the District Court to the Munsiff's Court—Civil Procedure Code, Secs. 223, 224, 228, 230 ; <i>See</i> Limitation ... .. | 478 |
| —, (1908) Sec. 12—Application for review ; <i>See</i> Limitation ... ..                                                                                                                                                                                                                                             | 235 |
| —, Sec. 14— <i>Bona fide</i> litigating for the same right—Plaintiffs litigating for their rights in a previous suit wherein they were defendants ; <i>See</i> Limitation ... ..                                                                                                                                    | 1   |
| —, Sec. 14—Prosecuting suit—Plaint, return of ; <i>See</i> Limitation ... ..                                                                                                                                                                                                                                        | 355 |
| —, Sch. I. Art. 116, 120, 132—Suit to realise value of paddy by sale of immovable property given by way of security for the repayment of loan—Suit to enforce payment of money charged on immovable property ; <i>See</i> Limitation ... ..                                                                         | 348 |
| —, Sch. I. Art. 142—Bengal Tenancy Act, Sch. III. Art. 1—Suit against purchaser in execution sale of permanent tenure—Permanent tenure forfeited by a condition in the lease ; <i>See</i> Ejectment ... ..                                                                                                          | 40  |
| — Sch. I. Art. 182—Step in aid of execution—Application to proper Court—Leave to bid ; <i>See</i> Decree, execution of ... ..                                                                                                                                                                                       | 462 |
| Lost deed—Presumption ; <i>See</i> Stamps ... ..                                                                                                                                                                                                                                                                    | 504 |
| Mahomedan law—Trusts—Private and public trusts—Power of the civil Court over them—Juma Musjid—Management, scheme of—Appointment of trustees—Code of Civil Procedure (Act XIV of 1882), section 539—Power of the Court thereunder—Matters to be considered in framing a scheme of management thereunder.             |     |

The Mussulman law like the English law draws a wide distinction between public and private trusts. Generally speaking, in a case of a *wakf* or trust created for specific individuals or a determinate body of individuals, the Kazi, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public or charitable trusts, of which a public mosque is a common and well-known example, the Kazi's discretion is very wide. He may not depart from the intention of the founder or from any rule fixed by him as to objects of the benefaction ; but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of

**Mahomedan Law—(Contd.)**

management which he may find either not practicable or not in the best interests of the institution.

In giving effect to the provisions of section 539 of the Code of Civil Procedure, 1882, and in appointing new trustees and settling a scheme thereunder the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on prior to suit, in conjunction with other existing conditions that may have grown up since its foundation. The Court has also the power of giving any directions and laying down any rules which might facilitate the work of management, and if necessary, the appointment of trustees in the future.

In this suit which was brought for the appointment of trustees and the settlement of a scheme of management in respect of the Sunni Juma Musjid at Rangoon, their Lordships remitted the suit to the Court of first instance with the declaration and directions that all other conditions being equal the Randheria sections of the worshippers were preferably entitled to manage and act as trustees ; that in order to avoid the mischief arising from the fact of leaving the power of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of worshippers like a *punchayet* or *jamaet*, the appointment of future trustees should be entrusted to a committee of the worshipper, the composition of which committee should be in the discretion of the Court, with due regard to local needs and conditions, subject to the provision that, so long as circumstances did not vary, a majority of such committee should be Randherias ; and that in settling the scheme the Court should lay down rules for the guidance of the committee in the discharge of any supervisitorial functions that might appear necessary to confide to them, and for filling up vacancies on their body subject to its control. **Mahomed Ismail Ariff v. Hajee Ahmed Moola Dawood** ... .. 198.

**Maintenance** of Hindu widow, necessity for, how measured ; *See* Hindu widow ... .. 487

**Misconduct** of the legal practitioner—Abusing officer of the Court in the hearing of the presiding Judge ; *See* Legal practitioner ... .. 190

————— of legal practitioner, what amounts to ; *See* Legal practitioner ... 190

————— of the legal practitioner in the presence of the Court—Contempt of Court ; *See* Legal practitioner ... .. 190

**Misdirection—Charge to Jury—Indian Penal Code (Act XLV of 1860). Secs. 27, 243—Possession of spurious coin by the servant—Master's knowledge—Time, moment of—Non-direction to Jury, if misdirection—Judge, statement of—Review under cl. 26 of the Letters Patent—Criminal Procedure Code (Act V of 1898), Sec. 537, if applicable—Whole case, if can be considered on review—Prosecution, duty of.**

In a case under section 243 of the Indian Penal Code it is necessary to direct the Jury to the effect that they should come to a decision (1) whether the counterfeit coins were in the possession of the accused, or in the

**Misdirection—(Contd.).**

possession of his clerk or servant on behalf of the accused ; and (2) if they came to the conclusion that the coins were in the possession of the accused, they would then have to decide whether he knew at the time when he became so possessed of them, that the coins were counterfeit ; and (3) if they came to the conclusion that the coins were in the possession of the clerk or servant on behalf of the accused, they would then have to decide whether at the time the clerk or servant on behalf of the accused became possessed of the counterfeit coins, the accused himself knew that they were counterfeit.

*Per Mooharjee, J.*—The statement of the Judge who presides at the trial as to what actually took place before him, is conclusive.

Mere non-direction is not necessarily misdirection.

Section 537 of the Code of Criminal Procedure has no application to a case reviewed under clause 26 of the Letters Patent.

When a point or points of law have been reserved or have been certified by the Advocate General as erroneously decided or as worthy of further consideration, and the Court on review holds on the point of law in favour of the accused, it has been the practice of the Courts to consider the whole case on the evidence and to pass such sentence as shall seem right.

*Quere.* Whether these cases have not in effect been overruled by the decision of the Judicial Committee in *Subramanya v. King Emperor*.

The duty of the prosecution is, not to secure a conviction, but to assist the Court in arriving at the truth, and for that purpose to place before the Court all the material evidence at its disposal. *Emperor v. Fateh Chand Agarwalla* [... ..]

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**Misjoinder of causes of action**—Suit on a mortgage for sale of the mortgaged property—Person setting up an adverse claim to the mortgaged property ; *See* Mortgage suit [... ..]

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——— of parties—Suit on a mortgage for sale of the mortgaged property—Person setting up an adverse claim to the mortgaged property ; *See* Mortgage suit [... ..]

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**Mohant—Bairagi Asthal**—Disqualification by marriage ; *See* Religious endowment [... ..]

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———, office of, succession to, how governed ; *See* Religious endowment... [... ..]

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**Mohantship**—Abdication in favour of a disqualified person, effect of ; *See* Religious endowment [... ..]

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**Money paid under an illegal order, where to be refunded ;** *See* Decree, execution of [... ..]

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**Mortgage—Suit on a mortgage bond—Indian Evidence Act (I of 1872), sections 68, 69, 70—Admission of execution by the sole mortgagor—Proof of attestation, if necessary, as against other parties not admitting execution.**

*Per Woodroffe and D. Chatterjee, JJ. (Newbould J. contra)*—In a suit on a mortgage bond, the admission of execution by the sole mortgagor does not dispense with the necessity of complying with the provisions of section 68 of the Evidence Act, in order to prove the execution of the docu-



**Mortgage—(Contd.).**

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| ment as against other parties in the suit who do not admit such execution. <i>Satis Chandra Mitra v. Jogendra Nath Mohalanabis</i> ...                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 175 |
| <b>Mortgages in India before the Transfer of Property Act, how made ; See</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |     |
| Stamps ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 504 |
| <b>Mortgage suit—</b> <i>Person setting up an adverse claim to the mortgaged property—</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |     |
| <i>Misjoinder of Parties—Practice—Misjoinder of causes of action—Subject</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |     |
| <i>matter of appeal, method of valuation—Value of land mortgaged or value</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |     |
| <i>of mortgage—Appeal to Privy Council—Certificate of value by High Court</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |     |
| <i>not conclusive when proceeding upon a wrong principle—Code of Civil</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |     |
| <i>Procedure (Act V of 1908), S. 110.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |     |
| In a suit on a mortgage for sale of the mortgaged property, the plaintiff impleaded not merely the person who claimed under the mortgagor, but also the appellant who had set up adverse claims to the mortgaged property.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |     |
| <i>Held</i> , that the cause of action against the appellant, viz., the right to obtain a declaration of title against his adverse claim, was quite distinct from the cause of action against the mortgagors and persons claiming under them, viz, the enforcement of rights under the mortgage ; and that such joinder of parties and causes of action was irregular and embarrassing.                                                                                                                                                                                                                                                                                                                                                                                                                                                      |     |
| The trial Court held that the appellant thus irregularly impleaded, was entitled to a small portion of the land subject of the mortgage. The High Court on appeal reversed this finding and included such portion in the mortgage decree. The appellant applied for a certificate to appeal to the Privy Council. The plaintiff opposed on the ground that the land in dispute was below Rs. 10,000 in value. The High Court however granted the certificate on the ground that the decree imposed upon the land a liability in respect of the whole of the amount of the mortgage which was more than Rs. 10,000. In the Privy Council the plaintiff respondent took the objection that the appellant was not competent to maintain the appeal as of right, inasmuch as the value of the subject matter of the appeal was below Rs. 10,000. |     |
| <i>Held</i> , that this objection must prevail ; that the subject matter of the dispute in appeal was simply the value of what the appellant claimed, and that for the purpose of the certificate the value of the mortgage was immaterial.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |     |
| A certificate which on the face of it proceeds on a wrong principle is not conclusive of the certificate-holder's right to appeal. <i>Musammat Radha Kunwar v. Thakur Reoti Singh</i> ...                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 303 |
| <b>Mutt—</b> Origin, nature, objects, custom and practice ; <i>See</i> Religious endowment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 116 |
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| Ouster, what constitutes ; <i>See</i> Co-owner ...                                                                                                                                                                                                                                                                               | 165 |
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| Palks doing private and public duties ; <i>See</i> Permanent settlement ...                                                                                                                                                                                                                                                      | 296 |
| Parties, right of, how determined—Deposit of document of title to immovable property— <i>Notandum</i> on the back of a promissory note ; <i>See</i> Equitable mortgage ...                                                                                                                                                       | 314 |
| Partition—Intention to separate, how proved ; <i>See</i> Hindu Law—Partition ...                                                                                                                                                                                                                                                 | 207 |
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A Magistrate should not by successive orders under section 144 of the Code of Criminal Procedure extend the period of two months which clause (5) of that section prescribes.

**Period—(Contd.).**

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| In order to prevent any further difficulties in respect of the dispute between the parties the proper procedure to adopt is to commence proceedings against both the parties under section 107 of the Code. <i>Bliseswar Chakravarti v. The King Emperor</i> ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 272 |
| Permanent lease—Covenant for re-entry upon an involuntary sale—Mortgage, execution of, by lessee—Execution sale : <i>See Ejectment</i> ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 40  |
| Permanent Settlement— <i>Kabuliat</i> —Construction— <i>Zemindar's undertaking with respect to Sardars and Paiks</i> — <i>Paiks doing private and public duties</i> — <i>Land on service tenure</i> — <i>Land held by Paik having no connection with the police</i> — <i>Zemindar's right to resume such land</i> — <i>Chowkidari Chakran Land</i> — <i>Zemindar's right therein</i> — <i>Burden of proof that the lands in dispute are Chowkidari Chakran lands</i> — <i>High Court Practice</i> .<br>Where in January 1801 the Zemindar of pergunnah Nayabasan, which was settled with him in that year, executed a <i>Kabulyat</i> in favour of the Government under which he was bound to maintain and keep the same "Sardars and Paiks" who had all along existed in the pergunnah, and to carry out whatever order might be passed by the Magistrate on the Paiks :<br><i>Held</i> , that the Sardars and Paiks referred to in the <i>Kabulyat</i> were Sardars and Paiks employed on police duty ; that the document had no reference to Paiks who held Jaghirs within the pergunnah on tenure services personal to the Zemindar himself and having no connection with the local police ; and that the Zemindar was entitled to determine the employment of a paik who was in his personal service and held a Jaghir on service tenure determinable when his employment ceased, and to recover possession of his Jaghir.<br>Chowkidari Chakran lands are lands which at or before the permanent settlement had been appropriated or assigned for the maintenance of the police force and by reason of such appropriation excluded from the Zemindari assessment. The Zemindar is precluded by Bengal Regulations I of 1793 and XIII of 1805 from utilising Chowkidari Chakran lands for remunerating persons who are his personal servants and performed no police duties, but the onus of proving that the lands in dispute are so appropriated or assigned is on the Government. <i>Maharaja Sri Ram Chandra Bhanj Deo v. The Secretary of State for India in Council</i> ... .. | 296 |
| Permanent tenure— <i>Rent, enhancement of</i> — <i>Bengal Tenancy Act (VIII of 1885) section 6, Cls. (a) and (b)</i> — <i>Continuity of tenure</i> .<br>The continuity of a transferable tenure is not affected by sub-division or by consolidation. <i>Chandra Kanta Chakravarty v. Ram Krishna Mahalanobish</i> ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 275 |
| Person in adverse possession for less than statutory period, if a defaulter—Sale for arrears of land revenue—Assam Land and Revenue Regulation, Sec. 70 ; <i>See Limitation</i> ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 62  |
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- Plaintiff** in possession of immovable property, if to prove better title in himself to possession than that of the defendant—*Declaratory suit*; *See Appeal* ... .. 391
- Pleading**—*Fraud, allegation of—Specific charge and strict proof, necessity of.*  
 When the plaintiff sets up a charge of fraud against the defendant it is necessary for him to state in the plaint clearly and specifically what the fraud consists of, the nature of the fraud, and the particulars thereof which he says has been committed, and when he has pleaded that, it should be shown by strict proof that such fraud has been committed.  
**Lalit Mohan Nandy v. Haridas Mukherjee** ... .. 335
- Inference against the claim of the plaintiff—Evidence**; *See Account, suit for* ... .. 509
- Possession**—*Co-owner—Co-owner's possession when adverse.*  
 Possession is never considered adverse if it can be referred to a lawful title. The possession of one of the owners of a property is in law the possession of his co-owner, and nothing short of ouster or something equivalent to ouster can put an end to that possession.  
 Where, however, the possession of both the co-owners of a property was terminated by a hostile third party, who claimed to hold the property adversely to both of them, and one of the co-owners subsequently came into possession of the property under a lease granted by the adverse possessor and continued to do so for more than 12 years :  
*Held*, that the title of the other co-owner to the property was extinguished inasmuch as the possession of the property must be referred to the title which the co-owner acquired under the lease and not to his title as a co-owner of the property. **Biseswar Ganguly v. Bhagabail Charan Banerjee** ... .. 38
- of spurious coin by servant—Master's knowledge—Time, moment of**; *See Misdirection* ... .. 400
- Pre-emption**—*Shaffee, rights of—Right of pre-emption not existing at the date of the decree by the trial Court, if enforceable—Events subsequent to institution of suit, if Court can take notice of—Review of judgment—Application based on a ground never taken before, maintainability of.*  
 In a suit for pre-emption, the right of the plaintiff to get pre-emption must exist not only at the time of the sale, but also at the time of the institution of the suit, and finally upto and at the date of the decree.  
*Per Mookerjee, J.* :—Ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution ; but there are cases where it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit, and to mould its decree according to the circumstances as they stand at the time the decree is made. This principle will be applied where it is shown that the original relief claimed has by reason of subsequent change of circumstances become inappropriate, or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties,

**Pre-emption—(Contd.).**

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| Where the ground assigned in support of an application for review raises a pure question of law and its determination does not depend upon the investigation of new facts, and the alleged error is apparent on the face of the record, the application for review will be entertained although the ground was not taken at any stage of the proceedings. <i>Nuri Mian v. Ambica Singh</i> ... .. | 140 |
| <b>Pre-emption, right of, not existing at the date of the decree of the trial Court, if enforceable ; See Pre-emption</b> ... ..                                                                                                                                                                                                                                                                  | 140 |
| ————— suit for—Plaintiff's right, how long to subsist ; <i>See Pre-emption</i> ...                                                                                                                                                                                                                                                                                                                | 140 |
| <b>Presidency Towns Insolvency Act, Sch. II. cl. (18)—Purchaser of part of insolvent's property, if proper or necessary party ; See Cross-examination</b> ...                                                                                                                                                                                                                                     | 149 |
| <b>Presumption—Landlord forbearing to claim rent from an occupancy raiyat for 40 years ; See Tenancy</b> ... ..                                                                                                                                                                                                                                                                                   | 363 |
| ————— that document accepted by Court is properly stamped ; <i>See Stamps</i> ... ..                                                                                                                                                                                                                                                                                                              | 504 |
| <b>Principal and agent—Proprietor appointed by a co-proprietor as common manager for payment of debts on the estate, whether an agent of the latter and, on his death, of his sons ; See Account, suit for</b> ...                                                                                                                                                                                | 509 |
| <b>Private rights, interference of—Corporation—Statutes, construction of ; See Calcutta Improvement Act</b> ... ..                                                                                                                                                                                                                                                                                | 246 |
| <b>Privy Council, appeal to—Subject matter of appeal, method of valuation—Value of land mortgaged or value of mortgage ; See Mortgage suit</b> ...                                                                                                                                                                                                                                                | 303 |
| <b>Procedure, proper—Period, expiry of—Criminal Procedure Code, Sec. 144, Successive orders under ; See Period, extension of</b> ... ..                                                                                                                                                                                                                                                           | 272 |
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| <b>Prosecution, duty of ; See Misdirection</b> ... ..                                                                                                                                                                                                                                                                                                                                             | 400 |
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| <b>Provincial Small Cause Courts Act, Sec. 17, applicability of—Application for restoration of a case—Alternative prayer for review ; See Application...</b>                                                                                                                                                                                                                                      | 446 |
| ————— Sch. II. Art. 31—Suit for recovery of money to be found due on settlement of accounts, from the defendant ; <i>See Accounts, suit for</i> ... ..                                                                                                                                                                                                                                            | 187 |
| <b>Purchaser, rights of—Sale on account of arrear of land revenue—Unrecorded proprietor of the estate—Title acquired by adverse possession—Assam Land and Revenue Regulation (I of 1886), Secs. 63, 70, 71.</b>                                                                                                                                                                                   |     |
| On a sale held under section 70 of the Assam Land and Revenue Regulation on account of an arrear, a person who has acquired a good title by adverse possession against the original proprietor at the time of sale, is a defaulter and cannot assert a good title as against the purchaser, an unrecorded proprietor of the estate.                                                               |     |
| <b>What is sold is the estate and the purchaser is entitled to take that estate as against the defaulting proprietors. <i>Aftar Ali v. Brojendra Kishore Roy Chowdhury</i></b> ... ..                                                                                                                                                                                                             | 60  |
| <b>Purchaser at a sale for arrears of land revenue, what acquires ; See Purchaser, rights of</b> ... ..                                                                                                                                                                                                                                                                                           | 60  |

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| <b>Purchaser of part of insolvent's property, if proper or necessary par y—Cross-examination by such person, effect of ; See Cross-examination</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | ... | 149 |
| <b>Railway receipt—Indian Contract Act (IX of 1872), Secs. 102, 103, 108 and 178—Stoppage in transitu—Expressions 'document showing title,' 'document of title,' and 'instrument of title' to goods—Test to be applied in determining whether a document is a document of title—Railway receipts, are instruments of title—Assignment by endorsement of railway receipt: by the buyer by way of pledge—Right of unpaid vendor—Transfer of Property Act (IV of 1882), Secs. 4 and 137.</b>                                                                                                                                                                                                                                                                                                                                             |     |     |
| Whenever any doubt arises as to whether a particular document is a 'document showing title' or a 'document of title' to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented.                                                                                                                                                                                                                                                                                                                                               |     |     |
| In the present case both Courts in India having found that the railway receipts in question satisfy the test, their Lordships held that even apart from sections 4 and 137 of the Transfer of Property Act, 1882, (as amended), the said receipts were documents showing title to goods within sections 102 and 108 and documents of title within the meaning of section 178, and also instruments of title within the meaning of section 103 of the Indian Contract Act, 1872 ; and consequently as the said railway receipts were assigned by endorsement by the buyer of the goods to the respondents respectively by way of pledge to secure advances made specifically on them, the seller could not have stopped the goods in transit without payment or tender to the respective respondents of the amounts of their advances. |     |     |
| In the Indian Contract Act the three expressions, (1) 'document showing title,' (2) 'document of title,' and (3) 'instrument of title,' are used in the same sense.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |     |     |
| The Indian Contract Act, 1872, is an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law, and there is no improbability in the Indian legislature having at the time of passing that Act, taken the lead in a legal reform of the law of contract for which England had to wait several years thereafter. <b>Ramdas Vitthaladas Durbar v. S. Ameerchand &amp; Co.</b> ... .. 320                                                                                                                                                                                                                                                                      |     |     |
| <b>Railway receipts, instruments of title ; See Railway receipt</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | ... | 320 |
| <b>Raiyat land, lease of, if valid—Lease, grant of, without the approval of co-sharer Gaontias—Central Provinces Land Revenue Act, Sec. 138 ; See Lambardar Gaontia, settlement by</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | ... | 83  |
| <b>Reasons not recorded for admission of evidence, effect of ; See Appellate Court</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |     | 457 |
| <b>Recoupment, acquisition for, and taxation for, distinction between ; See Calcutta Improvement Act</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | ... | 246 |
| <b>Regulation VII of 1793, Preamble, Secs. 2, 5</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | ... | 382 |

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| — X of 1829, Secs. 3, 17, Sch. A, Arts. 3, 20 ... ..                                     | 504   |
| — I of 1886, Secs. 63, 70, 71 ... ..                                                     | 60    |
| — I of 1886, Secs. 70, 80, 85 ... ..                                                     | 62    |

Release of a portion of the holding by a raiyat in favour of some of the land-  
lords—Possession relinquished—Portion acquired for the purpose of hold-  
ing market—Land let out for agricultural purpose; *See* Injunction ... 85

Religious endowment—*Hindu Law—Muth or Asthal—Mahant—Succession—*  
*Custom—Property of the Muth—Disqualification by marriage—Abdica-*  
*tion in favour of a disqualified person, effect of—Document appointing*  
*such a person—Trial Judge's finding on question of fact, value of.*

The question as to who has the right to succeed to the office of Mahant depends, according to the well-known rule in India, not on the general customary law, but upon the custom and usage of the particular Asthal or Muth.

The whole assets of an Asthal or Muth are vested in the reigning Mahant as the owner in trust for the institution itself, and although large administrative powers are undoubtedly vested in him, the trust does exist and must be respected. The succession to him in such property follows with the succession to the office.

In a Bairagi Asthal a married man who prior to initiation as a Bairagi Chela has not renounced his wife and family and has not conformed to the practice of celibacy, is incompetent to be Mahant of the Asthal, and the Mahant for the time being who knowingly abdicates in favour of such a person and appoints him as his successor, consents to a violation of the views and practice of asceticism and celibacy which it is his duty as the trustee-mahant to maintain and protect. Any document under which such an appointment is made is void and inoperative, and on the Court setting aside the appointment, the Mahantship does not revert to the relinquishing Mahant, but goes to the person entitled according to the custom of the institution to succeed him.

The origin, nature, objects, custom and practice of such religious institutions, and also the rights, privileges, duties and powers of a Mahant stated.

The Trial Judge found upon the evidence adduced that the allegation that the defendant was a married man had been established and that the plaintiff's case was true. This verdict was reversed by the High Court on appeal without stating sufficient grounds :

*Held*, that upon a question of fact, the verdict given by the Trial Judge who had the advantage of seeing and hearing the witnesses could not be lightly set aside, specially as that Judge was also presumably acquainted with the manners and customs of the people among whom the transaction was alleged to have occurred. *Held further*, upon an examination of the evidence, that this rule could not be departed from in the present instance. *Mahant Ram Parkash Das v. Mahant Anand Das* ...

- Remand**—New issue in second appeal—High Court's power to remand for trial of such issue ; *See* Second Appeal ... .. 296
- "Rendering land unfit for the purpose of the tenancy"**—Temporarily unfit—Bengal Tenancy Act, Sec. 23 ; *See* Injunction ... .. 85
- Rent, enhancement of**—*Rent, payable partly in cash and partly in kind*—Bengal Tenancy Act (VIII of 1885), Sec. 30, applicability of.
- The word "money-rent" in section 30 of the Bengal Tenancy Act refers to a tenancy where the rent is solely payable in money, and as such the section does not apply to a case in which rent is paid partly in cash and partly in kind. *Priya Nath Pal v. Tarini Charan Roy* ... .. 373
- , failure to pay, effect of—Adverse possession ; *See* Landlord and tenant... 453
- , suit for—Original tenant, heirs of—Liability, if joint and several—Decree against one, if maintainable—Indian Contract Act (IX of 1872), Sec. 43.
- In a suit by a co-sharer landlord for arrears of rent against the heirs of the original tenant the Court below passed a money decree, against one of the defendants only for the entire claim :
- Held*, that the decree could not stand inasmuch as it was not a case of a joint contract which might be enforced against any of the joint contractors, but the defendants became jointly interested by operation of law in a contract made by a single person. *Shalkh Sahad v. Krishna Mohan Basak* ... .. 371
- , suit for—Sale of portion of occupancy holding—Lease from purchaser taken by original raiyat—Landlord, right of—Settlement by landlord of the holding—Settlement-holder's right as against the original tenant—Estoppel.
- A sale of portion of an occupancy holding does not cause a forfeiture of the tenancy.
- So far as the landlord is concerned, the tenancy continues unaffected and he is entitled to look for payment of rent to his recorded tenant.
- There is no abandonment of the holding, if the original tenant after parting with a portion of the holding remains in actual possession of it as an under-raiyat from the purchaser.
- The disputed land belonged to A. In execution of a decree for money obtained against him, B purchased a portion of the holding. Thereupon the representative of the original tenant took subleases from the purchaser in respect of a portion only of the land acquired by him. The plaintiff took a settlement from the superior landlord of the disputed land which constituted the occupancy holding of A. He subsequently sued to eject B as a trespasser and obtained a decree against him. When he attempted to execute this decree, he was opposed by the defendant, the representative of the original tenant. The objection was allowed. The plaintiff then brought the present suit to recover rent from the defendant as his under-raiyat :
- Held*, that the relationship of landlord and tenant between the plaintiff and the defendant did not subsist and the claim for rent was not maintainable.



**Rent—(Contd.).**

That the original tenancy still continued and the landlord was not competent to create a valid occupancy holding in favour of the plaintiff.

That the defendant was not estopped from questioning the title of the plaintiff. *Kalim Sheikh v. Mocham Mandal* ... .. 113

**Report** of, outdoor inspector, bearing an eight-anna stamp, with Chairman's remark, if complaint; *See* Chairman, powers of ... .. 57

**Restitution—Dependent judgment or order—Restitution, when to be had—Limitation—Interest.**

It is a general rule that upon the reversal of a judgment, order or decree, all connected or dependent judgments or orders fall with it, specially judgments subsequently entered and dependent thereupon; but this rule does not operate by implication to set aside a distinct and independent judgment or proceeding though it forms a part of the same litigation.

Whether a judgment or order is a dependent judgment or order, that is, is merely ancillary and accessory to another judgment so as to have its fate and fall to the ground along with it, is to be determined from the nature and scope of the proceedings.

In cases not comprehended strictly within the letter of section 144 of the Civil Procedure Code (which makes grant of restitution obligatory in certain circumstances) restitution is not a matter of right but depends upon the sound discretion of the Court and will be ordered only when the justice of the case calls for it; but the test of what is just, must be determined with reference to the imperative requirements of the law applicable to the subject matter.

An obligation is imposed upon the Court to dismiss an application for execution of a decree, if the application is barred by limitation. Hence the Court cannot withhold relief by way of restitution, when a sum has been paid out on the strength of an erroneous decision upon a point of limitation.

The Court will not permit an injustice to be done by reason of an erroneous order made by it and will, when that erroneous order has been reversed, restore the parties to the position which they would otherwise have occupied.

When a person receives money under a decree which is afterwards reversed on appeal, the statute of limitation commences to run in his favour only from the reversal.

When a decree-holder withdraws money under a decree which is afterwards reversed on appeal, he is bound to restore the amount with interest at the rate of 6 per cent. per annum from the date of withdrawal to the date of repayment into Court. *Ashutosh Goswami v. Upendra Prosad Mitra* ... .. 467

———, not coming within section 144 C. P. C., nature of; *See* Restitution ... .. 467

———, relief by—Sum paid out on the strength of an erroneous decision; *See* Restitution ... .. 467

———, when to be had; *See* Restitution ... .. 467

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| Revenue officer, jurisdiction of—Suits for declaration of title and for recovery of possession ; <i>See</i> Bengal Tenancy Act, Secs. 106, 109 ...                                                                                                                                                                                        | 79  |
| Reversionary heir, position of ; <i>See</i> Hindu Law—Widow's estate...                                                                                                                                                                                                                                                                   | 309 |
| Reversioner, attesting—Attestation of deed, effect of ; <i>See</i> Hindu widow ...                                                                                                                                                                                                                                                        | 487 |
| ———, not entitled to declaration of right during widow's lifetime ; <i>See</i> Hindu Law—Widow's estate ...                                                                                                                                                                                                                               | 309 |
| Review— <i>Non-appealing party, if can apply—Appeal to lower appellate Court—Second appeal by some of the parties—Civil Procedure Code (Act V of 1908), O. 47, R. 2—“Where the ground of such appeal and the review are based on the same grounds”—Decree of the appellate Court, effect of—Appeal by some of the parties, effect of.</i> |     |

The plaintiffs instituted a suit for recovery of possession of land against five defendants, who claimed to hold it under one title. The suit was decreed. An appeal preferred by all the defendants was dismissed. Three of the defendants (*i. e.* the defendants other than the first two) then preferred a second appeal and made respondents the plaintiffs and also the defendants who had not joined them in the appeal. The appeal was summarily dismissed under O. 41 R. 11 of the Code of Civil Procedure :

*Held*, that an application for review on the ground of discovery of new and important evidence by the first two defendants, who did not prefer a second appeal, was entertainable by the lower appellate Court.

A defendant, who has not himself appealed, may apply for a review of judgment, notwithstanding the pendency of an appeal by a co-defendant, except in two contingencies, namely, *first*, where the ground for review is identical with the ground for appeal, and, *secondly*, when, as respondent in the appeal, he can present to the appellate Court the case on which he seeks review. Where the grounds on which the appeal was preferred, were different from the ground on which the review is sought, namely, the discovery of new and important matter or evidence, the case does not fall within the exception.

The expression “where the ground of such appeal is common to the applicant and the appellant” in order 47 rule 1 (2) of the Code of Civil Procedure, refers to a case where the appeal and the review are based on the same grounds, and does not contemplate a comparison between the actual appeal by the defendant and a possible hypothetical appeal by the applicant for review.

If the decree of the lower Court is reversed by the appellate Court, it is absolutely dead and gone ; if, on the other hand, it is affirmed by the appellate Court, it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place for all intents and purposes ; both the decrees cannot exist simultaneously. The fact that an appeal has been dismissed under order 41 rule 11 of the Code of Civil Procedure, makes no difference in principle.

The effect of an appeal by some alone of the parties affected by a decree,

## Review—(Contd.).

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| is to leave untouched the decree as between the parties thereto.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |     |
| <b>Chandra Kant Bhattacharyya v. Lakshman Chandra Chakrabarti</b> ...                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 517 |
| —Whole case, if can be considered on review under cl. 26 of the Letters Patent ; <i>See</i> Misdirection ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                    | 400 |
| —, application for—High Court judgment—Limitation Act, Sec. 12 ; <i>See</i> Limitation ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 235 |
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| In the absence of anything to denote the contrary, a sale of a tenure held in execution of a decree for its own arrears of rent <sup>a</sup> passes it free from liability for previous arrears. <b>Mathura Mohan Saha v. Nabin Chandra Datta</b> ... ..                                                                                                                                                                                                                                                                                           | 34  |
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| Sanction for prosecution of a public authority, if to be under seal of that authority Bengal Municipal Act, Sec. 353 ; <i>See</i> Chairman, powers of ...                                                                                                                                                                                                                                                                                                                                                                                          | 57  |
| — to prosecute— <i>False information to Police—Criminal Procedure Code, Secs. 4 (p), 195 (1) (b), 476—Penal Code, Sec. 211.</i>                                                                                                                                                                                                                                                                                                                                                                                                                    |     |
| No sanction to prosecute is necessary under section 195 (1) (b) of the Code of Criminal Procedure when a false charge has been made to the Police and has not been followed by a judicial investigation thereof by a Court. Where, therefore, the complainant to the Police never applied to the Magistrate for investigation, nor did he impugn the correctness of the Police Report as to the falsity of the complaint nor did he pray that the person accused by him might be brought to trial, nor was he examined on oath by the Magistrate : |     |
| <i>Held</i> , that the order for sanction to prosecute him was bad, if it was deemed to have been granted under section 195 of the Code, inasmuch as there was no 'complaint' within the meaning of section 4 (h) of the Code, and the offence could not be said to have been committed in a proceeding in a Court.                                                                                                                                                                                                                                |     |
| <i>Held further</i> , that the order for prosecution could not also be sustained under section 476 of the Code, as that section must be read with section 195 and is consequently restricted by the limitations contained in clause (b) of the section and the alleged offence under section 211 Indian Penal Code was committed neither in Court nor brought under its notice in the course of a judicial proceeding. <b>Tayab Ullah v. King-Emperor</b> ...                                                                                      | 134 |

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| <b>Second appeal—Bengal Tenancy Act, Sec. 153 (b)—Judicial officer especially empowered to exercise final jurisdiction—Question of conflicting title not decided by primary Court—First appellate Court deciding question of conflicting title ; See Appeal</b> ... ..                                                                                                                      | 235 |
| <b>—————<i>New issue in second appeal—High Court's Power to remand the case for trial of such an issue.</i></b>                                                                                                                                                                                                                                                                             |     |
| <b>Even if it be competent to the High Court in second appeal to remit a case for rehearing on an issue not raised in the pleading or even suggested in the Courts below, that ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away. <i>Maharaja Sri Ram Chandra Bhanj Deo v. The Secretary of State for India in Council</i></b> ... .. | 296 |
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| <b>Specific performance—Contract to bequeath a village—Proposal with a condition—Acceptance—Compliance with condition—Contract to bequeath a village ; See Contract</b> ... ..                                                                                                                                                                                                              | 279 |
| <b>—————<i>suit for—Explanation of 'specific performance'—Vendor and purchaser—Contract to sell and purchase a decree—Transfer—Assignment—Duty to keep decree alive until assignment—Code of Civil Procedure (Act XIV of 1882), Sec. 232.</i></b>                                                                                                                                           |     |

The expression 'specific performance,' as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other, in which by the preliminary agreement they were intended to be put.

The Court will not decree a suit for specific performance of an agreement if it finds that at the date of suit the plaintiff cannot complete the agreement by doing what remained to be done by him under it.

Where a decree-holder agrees to sell his decree, a transfer thereof to the purchaser could, by reason of section 232 of the Code of Civil Procedure, 1882, be effected only by an assignment in writing, and until such an assignment it is the duty of the decree-holder (the vendor) to keep the decree alive ; and if owing to the bar of limitation the decree becomes incapable of execution, the vendor cannot maintain a suit for specific performance of the agreement against the purchaser inasmuch as the

**Specific Performance—(Contd.).**

decree, which the purchaser has agreed to purchase and which the vendor has agreed to assign to him, is a decree incapable of execution. **Jatindra Nath Basu v. Srimati Peyer Deye Debi** ... ..

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—, suit for—*Proof—Non-performance of contract, when excused—Tender full amount.*

The plaintiff who seeks specific performance of a contract has to show, *first*, that he has performed or been ready and willing to perform the terms of the contract on his part to be then performed; [*Bungsheedhur v. Calcutta Auction Compay*; *Ram v. Mullicka*; and *Ghillis v. Mc. Ghee* referred to] and, *secondly*, that he is ready and willing to do all matters and things on his part thereafter to be done [*Walker v. Jeffreys*; and *Vishwanath v. Bapu* referred to.] A default on his part in either of these respects furnishes a ground upon which the action may be resisted.

Non-performance by the plaintiff in a suit for specific performance is excused when that has resulted from the default of the vendor defendant.

A contract of sale was made orally on the 1st February, 1911. The price was fixed at Rs. 400; one rupee was paid on the date of the agreement which was to be carried out and completed within 10 days:

*Held*, that it was obligatory upon the vendee to tender the balance of the purchase money to the vendor on or before the 11th February, 1911, and that as he did not do so, there was a default on his part in the performance of an essential term of the contract.

The fact that the tender of the full amount would never have been accepted by the vendor would be no ground for non-performance on the part of the vendee. **Manik Chandra Bhowmik v. Abhoy Charan Gope** ...

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—, suit for, plaintiff, what to prove; *See* Specific performance, suit for ... ..

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— performance, what is; *See* Specific performance, suit for... ..

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— performance of an agreement, suit for—Plaintiff unable to complete the part of the agreement—Suit, if to be decreed; *See* Specific performance, suit for ... ..

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**Stamps—Bengal Regulation X of 1829, Secs. 3, 17 and Sch. A, Arts. 3, 20—Lost deed alleged to be insufficiently stamped—Presumption that documents accepted by Court are properly stamped—Mortgages in India before the Transfer of Property Act (IV of 1882)—No writing required.**

In a suit for redemption of an usufructuary mortgage dated 1857, the document on which the plaintiff relied to establish the mortgage was a certified copy of a petition of compromise filed in Court in that year. The suit was based on the recital in the petition relating to the mortgage and the certified copy in question bearing a 1 rupee stamp was issued in 1857. The record of the proceedings in which the petition was filed was destroyed in the mutiny. The defendants objected that the contract was not enforceable, inasmuch as the document was not properly stamped:

## Stamps—(Contd.).

- Held*, that before the Transfer of Property Act came into force, such mortgages could be created without any writing outside the Presidency towns by simple delivery of possession ; that the said petition recited the terms on which the then dispute was settled among them being the agreement relating to the usufructuary mortgage ; that the mortgage was verbal and was valid and the present suit was not based on an agreement contained in the petition ; that if the petition was treated as the document creating the mortgage, it must be presumed that the officer before whom it was presented satisfied himself that it was properly stamped and no inference that it was not so stamped could be derived from the fact that the copy bears a 1 rupee stamp. **Almad Raza v. Salyid Abid Husain** ... 501
- Stamp Act (II of 1899), Section 64, cl. (c)**—"Any other act," meaning of—*Document insufficiently stamped—Prosecution under the section, if maintainable.*
- The words "any other act" in clause (c) of section 64 of the Indian Stamp Act, mean an act of a like nature to those which are specified in clauses (a) and (b) ; and thus the mere fact that a person puts a stamp on a document, which he knows not of proper value, would not bring the case within clause (c) of the section. **Chhakmal Chopra v. The King-Emperor** ... 441
- , Sch. I. Art. 5 (c)—Agreement—Hire-purchase instrument—Agreement to hire machinery, with an opinion on the part of the hirer to purchase ; *See Stamp duty* ... 93
- Stamp duty—Indian Stamp Act (II of 1899), Sch. I Art 5 (c)—Hire-purchase instrument—Agreement or conveyance.**
- An instrument described as a hire-purchase contract was entered into between A and B whereby one Linotype Machine was hired by the latter for 27 months upon terms and conditions set forth in the document. The question arose whether this is to be stamped as an agreement or a conveyance. • •
- Held*, upon the construction of the document that it is simply an agreement to hire the machinery in question, with an option on the part of the hirer to purchase and as such it is liable to be stamped as an agreement within the meaning of Art. 5 cl. (c) of Schedule I to Indian Stamp Act and not as a conveyance. **In re Linotype and Machinery Co. and Windsor Press** ... 93
- Statutes, construction of—Private right, interference of—Corporation ; See Calcutta Improvement Act** ... 246
- , interpretation of—Number—Gender—General Clauses Act, Sec. 2 (i) (ii) ; *See Legal practitioners* ... 382
- Statutory rules, construction of ; See Legal practitioners** ... 382
- Step in aid of execution—Application for execution—Application for sale of property situate within the jurisdiction of the Munsiff's Court made to the District Court—Decree transferred by the District Court to the Munsiff's Court—Civil Procedure Code, Secs. 223, 224, 228, 230—Limitation Act, Sch. II. Art 179 ; See Limitation** ... 478

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| Stoppage in transitu—Assignment by endorsement of railway receipt by the<br>buyer by way of pledge—Contract Act, Secs. 102, 103, 108, 178 ; <i>See</i><br>Railway receipt ... ..                                                                                                                                                                                                                                                                                  | 320   |
| 'Street', meaning of ; <i>See</i> Calcutta Improvement Act ... ..                                                                                                                                                                                                                                                                                                                                                                                                 | 246   |
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| —————Purpose, change of ; <i>See</i> Calcutta Improvement Act ... ..                                                                                                                                                                                                                                                                                                                                                                                              | 246   |
| Sub-lease— <i>Bengal Tenancy Act (VII of 1885), Sec. 85—Admissibility in</i><br><i>evidence—Oral evidence of the terms of agreement—Evidence Act (I of</i><br><i>1872), Sec. 91.</i>                                                                                                                                                                                                                                                                              |       |
| Where a sub-lease has been registered in contravention of the terms of<br>section 85 of the Bengal Tenancy Act and has been followed by posses-<br>sion, the sub-lessee, if dispossessed, is entitled to recover possession.<br>Gonesh Mondol v. Thanda Namasundrani ... ..                                                                                                                                                                                       | 539   |
| ————— <i>Estoppel—Lessor and lessee—Lessee, if can question lessor's title—</i><br><i>Sub-lease invalid—Bengal Tenancy Act (VIII of 1935), Sec. 85 (a)—</i><br><i>Bengal Tenancy Act, scope of.</i>                                                                                                                                                                                                                                                               |       |
| The title of a grantee, who can fall back upon prior possession as tenant<br>or otherwise, cannot be defeated by mere proof of contravention of<br>section 85 of the Bengal Tenancy Act.                                                                                                                                                                                                                                                                          |       |
| As between grantor and grantee, the rule of estoppel applies, when the<br>elements essential to attract its operation are proved to exist.                                                                                                                                                                                                                                                                                                                        |       |
| The creation of the complete relation of landlord and tenant has the effect<br>in law of estopping the tenant to deny the validity of the title which he<br>has admitted to exist in the landlord ; the estoppel arises not by reason<br>of some fact agreed or assumed to be true, but as the legal effect of<br>carrying the contract into execution, of the tenant taking possession of<br>the property from the hand of the lessor.                           |       |
| Every estoppel ought to be reciprocal, that is, to bind both parties, and<br>this is the reason that a stranger shall neither take advantage of nor be<br>bound by the estoppel.                                                                                                                                                                                                                                                                                  |       |
| The Bengal Tenancy Act is not a complete Code even in respect of the<br>law of landlord and tenant ; much less does it profess to incorporate the<br>general principles of the law of contract and the doctrine of equity<br>jurisprudence, in so far as they may have to be applied in the determina-<br>tion of disputes between landlords and tenants.                                                                                                         |       |
| Under the under-tenure lease from the plaintiffs, who were subsequently<br>found to be occupancy raiyats, the defendants entered into possession of<br>the leasehold property :                                                                                                                                                                                                                                                                                   |       |
| <i>Held</i> , that the defendants could not be permitted to allege or prove that<br>the plaintiffs were occupancy raiyats at the date of the lease executed in<br>their favour ; that the defendants could not show that the lease was void<br>and that no interest passed to them ; that the parties were mutually<br>bound by the terms of the lease ; that it was no more open to the<br>defendants than to the plaintiffs to prove facts contradictory to the |       |

**Sub-lease—(Contd.).**

allegations which formed the basis of the contract, after that contract had been carried into execution and the contracting parties had enjoyed benefit thereunder. **Bamandas Bhattacharyya v. Nilmadhab Saha** ...

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——— *Validity, who can question—Bengal Tenancy Act (VIII of 1885), Sec. 85 (1).*

Where a sub-lease created by a talayat for a term exceeding nine years was the only title on which the grantee relied so that he could not fall back on prior possession as tenant or otherwise, his suit to recover *khas* possession was dismissed. **Balsnab Charan De v. Sarat Chandra Kar** ...

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**Sub-lessee**, if dispossessed, can recover possession—Sub-lease registered in contravention of section 85 of the Bengal Tenancy Act—Sub-lessee given possession; *See Sub-lease* ...

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———, if can be dispossessed—Sub-lessee's prior possession—Grant in contravention of section 85 of the Bengal Tenancy Act; *See Sub-lease* ...

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**Subordinate Court**, if can enquire into the conduct of the legal practitioner falling within section 14 of the Legal Practitioners Act; *See Legal practitioner* ...

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**Sub-tenancy**—*Permission at the time of creation, if necessary—General permission, if sufficient—"Express permission"—"Protected interest"—Bengal Tenancy Act, Sec. 160 cl. (g).*

Section 160 cl. (g) of the Bengal Tenancy Act does not contemplate that the tenant should come each time to his landlord and ask him for express authority in writing, authorising the specific interest which the tenant intends to create. A permission to create an interest of a particular description given in the lease granted by the landlord, is sufficient for the purposes of section 160 cl. (g) of the Act.

A deed by which a *darpatni* was created contained the following words:—

"I give you a right to alienate the land at pleasure by gift and sale, and to grant *sepatni* by settlements of your own interest :"

*Held*, that the words were sufficient to authorise the creation of a sub-tenancy within the meaning of section 160 cl. (g) of the Bengal Tenancy Act, and as such a *sepatni* created by the *darpatnidar* was a "protected interest" not liable to be annulled under the Act. **Bidhumukhi Chowdhurani v. Asmatulla** ...

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**Succession**—Assets of an *Asthal* or *mutt*; *See Religious endowment* ...

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——— to the office of *Mohant*, how governed; *See Religious endowment* ...

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**Suit**, continuation of—Proceedings on appeal; *See Suit*, stay of ...

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——, if lies, before removal of fixture, to declare right to compensation in case of removal; *See Compensation* ...

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——, if a suit for account—Test; *See Account*, suit for ...

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——, *maintainability—Partition—Trust deed executed by administrator with the permission of the District Judge—Trust deed empowering trustee to grant permanent leases—Person interested not impeaching the lease.*

A trust deed was executed with the sanction of the District Judge, by an administrator of the estate of a deceased co-owner in favour of a



**Suit—(Contd.).**

mortgagee, with power to trustees to grant permanent leases. In pursuance of that deed a permanent lease was executed in favour of the plaintiff. The latter remained in possession with other co-owners for about 7 years, when he brought a suit for partition. In that suit he impleaded a person who was interested in opposing the lease. He did not contest the lease.

- Held*, that the plaintiff had sufficient interest to maintain such a suit for partition. **Nawab Salimulla Bahadur v. Probhat Chandra Sen** ... 26
- , nature of, if altered by the form in which the claim is laid in the plaint; *See* Accounts, suit for ... 187
- , stay of—*Civil Procedure Code (Act V of 1908), Sec. 10—‘Matter in issue’—Suit for rent—Proceedings on appeal.*

Section 10 of the Code of Civil Procedure does not bar the trial of a suit for rent for a period subsequent to that included in the previously instituted suit for rent.

The expression ‘matter in issue’ in section 10 of the Code of Civil Procedure has reference to the entire subject in controversy between the parties.

The object of section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue.

- Proceedings on appeal are for many purposes deemed only a continuation of the suit instituted in the first Court **Bepin Behari Majumdar v. Jogendra Chandra Ghosh** ... 514
- , withdrawal of, without leave, effect of—*Civil Procedure Code, O. 23, R. 1 Sub-R. 3.*

- In the absence of permission to bring a fresh suit, O. 23, r. 1, sub-rule (3) of the Civil Procedure Code, precludes the plaintiff from instituting any fresh suit in respect of such subject matter or such part of the claim from which he has withdrawn. **Aswini Kumar Aich v. Saroda Charan Basu** ... 79
- , for recovery of amount paid—Putni taluk, purchase of—Application to set aside sale—Pending proceeding, second suit for rent—Payment by purchaser to save the taluk from sale; *See* Sale, effect of ... 34
- Surety, if fit or not—Judicial enquiry—*Criminal Procedure Code, Sec. 122; See* Surety ... 51
- , rejection of—*Criminal Procedure Code (Act V of 1908), sections 110 and 122—Surety, rejection of—Judicial enquiry—Want of sufficient control over the accused not a good ground of rejection.*

The question whether a particular person who is offered as a surety is or is not fit, within the meaning of section 122 of the Criminal Procedure Code, must be decided by the magistrate himself, upon evidence taken for the purpose; sureties offered should not be refused except after judicial enquiry.

- Rejection of sureties on the ground that they do not show that they have sufficient control over the accused is not valid in law. **Rayan Khan v. Emperor** ... 51
- , rejection of—Want of sufficient control over the accused; *See* Surety ... 51

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| Symbolical delivery of possession to purchaser at a revenue sale, effect of, against a person in adverse possession for less than statutory period ;<br><i>See</i> Limitation                                                                                                                                                                                                                                      | ... | ... | ... | ... | ... | 62  |
| Tenancy— <i>Bengal Tenancy Act (VIII of 1885), Sec. 5 cl. (5)—Applicability—Tenancy, if to be of 100 bighas at the date of suit—Presumption, if applicable to a tenancy existing before the coming into operation of the Act—Sub-division of tenancy—Incidents of divided tenure—Tenancy, real nature of, how determined—Occupancy raiyat holding at a rent not changed for 40 years, if raiyat at fixed rate.</i> |     |     |     |     |     |     |
| Clause 5 of section 5 of the Bengal Tenancy Act is not restricted in its application to suits or proceedings between landlords and tenants under the Act. Neither is it limited to cases of tenancy of more than 100 bighas in existence as such at the date of the institution of the suit wherein the question of the nature of such a tenancy arises for determination.                                         |     |     |     |     |     |     |
| The clause is a provision, not of substantive but of adjective law ; it lays down a presumption and changes the burden of evidence. The presumption is applicable to tenancy which existed before the commencement of the Act. The clause only codifies what had been a recognised doctrine under the old law.                                                                                                     |     |     |     |     |     |     |
| The clause is applied to determine the character of the tenancy of 126 bighas, although that tenancy has been sub-divided into two tenancies before the Bengal Tenancy Act came into operation. The tenure being divisible, the fact of sub-division does not create a breach of its continuity ; and each fragment carved out of the original tenure retained its incidents.                                      |     |     |     |     |     |     |
| The fact that some tenants of the land themselves carried on cultivation and did not collect rent from under-tenants, is not by any means decisive as to the character of the tenancy. The real nature of the tenancy is determined by proof of the purpose of the original grant.                                                                                                                                 |     |     |     |     |     |     |
| The mere forbearance on the part of the landlord to claim enhancement of rent from an occupancy raiyat for 40 years, does not lead to an inference that the original contract was for payment of rent by the tenant at a fixed rate for ever. <i>Jagabandhu Saha v. Magnamoyi Dasi</i>                                                                                                                             | ... | ... | ... | ... | ... | 363 |
| —, forfeiture of—Occupancy holding—Sale of a portion ; <i>See</i> Rent, suit for                                                                                                                                                                                                                                                                                                                                   | ... | ... | ... | ... | ... | 113 |
| —, nature of, how determined—Original grant, purposes of ; <i>See</i> Tenancy                                                                                                                                                                                                                                                                                                                                      | ... | ... | ... | ... | ... | 363 |
| Tenant, heirs of, liability of—Liability, if joint and several—Decree against one, if maintainable ; <i>See</i> Rent, suit for                                                                                                                                                                                                                                                                                     | ... | ... | ... | ... | ... | 371 |
| —, if and when can dispute landlord's title ; <i>See</i> Landlord and tenant                                                                                                                                                                                                                                                                                                                                       | ... | ... | ... | ... | ... | 453 |
| —, when exempt from payment of rent—Land washed away ; <i>See</i> Diluvion                                                                                                                                                                                                                                                                                                                                         | ... | ... | ... | ... | ... | 162 |
| —, when is said to hold over ; <i>See</i> Ejectment                                                                                                                                                                                                                                                                                                                                                                | ... | ... | ... | ... | ... | 30  |
| — holding over after expiry of term—Assent of landlord to the continuance of the occupation of the tenant after expiry of the term, how proved ; <i>See</i> Ejectment                                                                                                                                                                                                                                              | ... | ... | ... | ... | ... | 30  |

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| <b>Tenant</b> —holding over after expiry of term—Landlord not interfering with his possession, effect of ; <i>See</i> Ejectment                                                                                                                                                                                                                                                 | ... | ... | ... | 30  |
| <b>Tenure</b> , sale of, for its own arrears of rent, effect of—Tenure liable for previous arrears ; <i>See</i> Sale, effect of                                                                                                                                                                                                                                                 | ... | ... | ... | 34  |
| ——, transferable, continuity of, if affected by sub division or by consolidation ; <i>See</i> Permanent tenure                                                                                                                                                                                                                                                                  | ... | ... | ... | 275 |
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## ERRATA.

Page 38 after l. 25 Read

“ Babu Brajendra Nath Chattterjee for Appellant.

Asita Ranjan Ghosh for Respondent.”

Page 51 l. 24 for “Act V of 1908” Read “Act V of 1898”

„ 54 l. 23 for “Act V of 1908” Read “Act V of 1898”

„ 90, 91, 92 margin for “Civil, 1913” Read “Civil 1915”

„ 314 l. 32 after “which” omit “showed”

„ 22. l. 4 for “three” Read “four”

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THE HON'BLE MR. JUSTICE HASAN IMAM.





# The Calcutta Law Journal.

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VOL. XXIV. }

CALCUTTA, JULY, 1, 1916.

{ NO. 1.

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## SYED HASAN IMAM.

We have much pleasure in presenting to our readers a portrait of Syed Hasan Imam, lately one of the Judges of the Calcutta High Court. He was born at Neora in the District of Patna in 1871 and was called to the Bar on the 29th June, 1892. He rapidly attained distinction in his profession and at the time of his elevation to the Bench on the 5th February, 1912 was in the enjoyment of an extensive and lucrative practice both civil and criminal. He resigned his seat on the Bench on the 29th February, 1916, so that he might be free to revert to the Bar and take part in the political activities of his earlier days. His career on the Bench was characterised by independence of view and by unflinching devotion to duty, as might have been expected from the traditions of his family. His father Nawab Syed Imdad Imam is a striking personality and was made a Shamsululama in recognition of his position as a great oriental scholar. The Nawab is still in the enjoyment of the best of health and one can very well imagine the genuine pleasure with which he and his wife have witnessed the remarkably successful career of their sons Sir Syed Ali Imam and Syed Hasan Imam. Though the retirement of Syed Hasan Imam from the Bench of the Calcutta High Court cannot fail to be a source of genuine regret to all interested in the administration of Justice in this province, there can be little doubt that our loss in this direction will be amply compensated by the gain which is sure to accrue to the cause of public life in this country under the leadership of so gifted and so sincere a friend of Hindus and Mahomedans alike.



## SIR CHARLES CHITTY.

We desire to offer our respectful congratulations to the Hon'ble Mr. Justice Chitty on the occasion of the honour of knighthood conferred on him by his Majesty the King Emperor. This is but a fitting recognition of his long judicial career in three different Provinces.

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### DISTRIBUTION OF THE HIGH COURT BENCHES.

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**Mookerjee and Cuming JJ.**—Group I (24 Perganas, Nadia, Jessore, Khulna and Murshidabad) and appeals under Order 41, Rule 11 of all the Groups.

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PARENTAL RIGHTS—(*Contd.*).

## II.

While it is now generally recognized that no duty is imposed upon parents to educate their children in any particular phase of religious opinion the English courts have recognized that "one of the first and most sacred duties of the parents is to imbue the mind of the children with some religious belief, and this is done, not merely by precept and instruction, but by the unconscious influence of every day life and conduct" (1). The Court which deprived the poet Shelley of his children because he avowed himself an atheist (2) will probably to-day still regard a parent who refuses all religious instruction to a child as having forfeited all rights to the custody and training of the child (3).

It had been laid down as the law of parent and child that "*Religio sequitur patrem.*" Like many maxims, this is a glittering half truth that advances the discussion little. How far does it follow? In what way is it to follow? Indeed experience shows that in many instances it follows only by coming out in quite the opposite direction.

In applying a general rule that the father has the right to choose in what religion his child shall be educated the judges have divided themselves into two well-defined groups. This has been done quite unconsciously. Indeed the courts have failed to recognize the

(1) *F v. F* [1902] 1 Ch. 688. (2) *Shelley v. Westbrooke*, Jac. 266 (1821).

(3) By separation deed a father agreed that the infant daughter should remain with the mother eleven months each year and the mother refused to allow her child to receive religious instruction. The father did not interfere. The Court of Chancery Appeals (per James L. J.) in denying the mother custody laid down the principle :

"It would be impossible for the Court to allow its ward, a Christian child, the child of a Christian father, baptized in the Christian church, to remain under the guardianship and control of a person who professes and teaches and promulgates the religious or anti-religious opinions which the Appellant avows that she professes and intends to persevere in teaching and promulgating. We have nothing to do with the strength of the conscientious motives by which, as she alleges, she is impelled so to profess, teach, and promulgate. In the absence of the father (the father being assumed to be practically absent) the Court is the real guardian of the infant and must perform its duty to the ward accordingly, and, if necessary, wholly irrespective of the convictions or wishes of the mother and by separating the child from her. It is a plain, imperative duty which the law casts on the Court ; it is the plainest right of the infant ward. The same duty and the same right would exist if the child were the child of a Jew, a Parsee, a Mahomedan, or Buddhist." *In re Besant*, L. R. 11 Ch. D. 508, 519 (1878).

distinction between the precedents which they cite and the rule of law which they have recognized and differently interpreted in practice. It is commonly laid down that the court will enforce the wishes of the father as to the religious education of his children unless there is a coercive reason for disregarding them (1). The first class of cases hold that nothing short of an abandonment or forfeiture of this right on the part of the father justifies a court to direct a child educated in any other religion than that of its father. All other considerations play a minor part (2). Not merely do these courts give effect to the expressed wish of the father (3) but in the absence of any expression on his part create a presumption that it is his desire that his surviving minor child shall be educated in the religion which he professed even though he neglected it (4). So hard and fast do the cases in this class construe this rule of law that the right is enforced even when the result is "to create a barrier between a widowed

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(1) The authority of a father to guide and govern the education of his children "is not to be abrogated or abridged without the most coercive reason." *In re Meades*, 5 Ir. R. Eq. 98 (1870).

(2) "In no case, however, that I am aware of, where the father has been alive, has the Court disregarded his wishes concerning the religious education of his children, unless, as in this case, he has been himself a man so ill-conditioned and of such bad conduct that the Court thought fit altogether to deprive him of the custody of his children." *In re Newton*, (1896) 1 Ch. 740, 748 (per Lindley L. J.); *In re McGrath*, (1893), 1 Ch. 143; *In re Scanlan, Infants*, L. R. 40 Ch. D. 200 (1888); *Skinner v. Orle*, L. R. 4 P. C. 60 (1871); *F. v. F.*, (1902) 1 Ch. 688; *In re Montague*, L. R. 28 Ch. D. 82 (1884); *In re Walsh*, 13, L. R. Ir. 269 (1884).

"The law unquestionably does give great weight to the right of a father to have his children educated in his own religion both during his lifetime and after his death; and if a father has done nothing to forfeit or abandon his right to have his child educated in his own religion, we think that the Court cannot refuse to order a child to be educated in the religion of its father because it thinks that the child would be more happy and contented, and possibly be better provided for by its mother's relations." *Andrews v. Salt* L. R. 8 Ch. App. 622, 638 (1873).

(3) *Tablot v. Shrewsbury*, 4 My & C. 672 (1840); *In re Newbery*, L. R. 1 Eq. 431 (1865); *Davis v. Davis*, 10 W. R. 245 (1862); *Re Chilman's Infants*, 25 Ont. R. 268 (1894); *In re Kellers*, 5 Ir. Ch. 328 (1856).

(4) *Matter of North*, 11 Jur. 7 (1847); *In re Grey*, (1902) 2 Ir. 684.

"The wishes of the father if not clearly expressed by him must be inferred from his conduct. If the father is dead it will be naturally inferred that in the absence of evidence to the contrary his wish was that the children should be brought up in his own religion; that is, the religion which he professed. This inference is one which the Court in the absence of evidence to the contrary is bound to draw, and is practically not distinguishable from a rule of law to the

mother and her only child, to annul the mother's influence over her daughter on the most important of all subjects, with the almost inevitable effect of weakening it on all others; to introduce a disturbing element into a union which ought to be as close, as warm, and as absolute as any known to man; and lastly to inflict severe pain on both mother and child" (1).

effect that an infant child is to be brought up in its father's religion unless it can be shown to be for the welfare of the child that this rule be departed from, or the father has otherwise directed." *In re McGrath*, [1893] 1 Ch. 143, 148.

"..... there may be a difference of opinion as to whether the rule of law is really such as it is desirable to have in the case where the mother is of a different religion from the father, and the father has died without giving any express directions as to the religion in which the child is to be brought up. I can quite conceive that many persons might think that it would be for the interest of the child in such cases that the mother should be allowed to educate the child in her own religion; but that is not the rule of law. The rule of law is, that the religion of the father is to prevail over the religion of the mother, even in such a case ..."  
*Hawksworth v. Hawksworth*, L. R. 6 Ch. App. 539, 544-5 (1871).

"It was further said that the rule of law had its origin in the statutory power of the father to appoint guardians to the children; and that inasmuch as the mother has now co-ordinate power to this respect with the father, she ought now to have co-ordinate power with him in directing the religious education of the children. No doubt the power of the father to appoint guardians of the children afforded the means by which he was enabled to give effect to his views on their religious education; but I think that it cannot be said that it has been conclusively decided that the rule originated in the way alleged. The point was argued and considered in the case of *Skinner v. Orde* (L. R. 4 P. C. 60); and Lord Justice James, in delivering judgment, says no more than this (L. R. 4 P. C. 70): 'It was contended with some plausibility before their Lordships that this rule had its origin in the statutory power of English fathers to appoint guardians for their children.' This appears to me sufficient to show that the rule was not (even in the view of lawyers) so connected with the power of appointing guardians that the Legislature ought to be deemed to have abrogated it merely by conferring on the mother the power of appointing guardians; nor can I suppose that in a matter of so much difficulty and delicacy, the Legislature intended to abolish a well-established rule by a sidewind, without even a suggestion as to the rule to be substituted for it, and without indicating how a Court is to act when called upon to decide between co-ordinate authorities unhappily unable to agree on a question affecting the religious welfare of an infant." *In re Scanlan, Infants*, L. R. 40 Ch. D. 200, 214 (1888).

"It seems a strange extension of the father's rights when he is in his grave, to allow his expressed wishes, and still more his merely presumed wishes to override the rights of the living parent." *Hawksworth v. Hawksworth*, L. R. 6 Ch. 540 (1871).

(1) *Per Wickens v. C.*, *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539, 540 (1871).

The second class of these cases regard this right of the father as a trust, not a power. "The best interests of the child,"—its moral and spiritual welfare is made the paramount consideration, the wishes of the parent being relegated to a subordinate and very secondary place (1).

"When infants become wards of the Court the first and paramount duty of the Court unquestionably is to consult the well-being of the infants, and in discharging that duty the Court recognizes no religious distinctions. If, consistently with the due discharge of that duty, the wishes of the father can be attended to, the Court, having regard, as I apprehend, to the power with which the law of the country has entrusted the father of appointing guardians for his children, and thereby directing and regulating their future course of life, pays attention to those wishes; but if the wishes of the father cannot be carried into effect without sacrificing what the Court, acting without bias, judges to be for the well-being of the children, those wishes cannot be attended to...the wishes of the father may be in conflict with the well-being and even with the safety of the children." (2)

(To be continued.)

(1) *Austin v. Austin*, 34 Beav. 257 (1865); *W. v. M.* (1907) 2 Ch. 557; *In re Newton*, (1896) 1 Ch. 740; *Re Ullec*, 54 L. T. 286 (1885); *In re Newin*, (1891) 2 Ch. 299.

(2) *Stourton v. Stourton*, 8 DeG. M. & G. 760, 771-2 (1857).

"It is not the benefit of the infant as conceived by the Court, but it must be the benefit of the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can." *In re Agar-Ellis*, 24 Ch. D. 317, 337-8 (1883) (per Bowen., L. J.)

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{ NO. 2.

## THE TRIBUNALS IN ANCIENT INDIA. \*

“LUX GENTIUM LEX.”

“Ill Fares the State where License reigns ;  
But Law brings Order and concordant peace.”—*Solon*.

“Law is the Kshatra (power) of the Kshatra, therefore there is nothing higher than the law. Thenceforth even a weak man rules a stronger with the help of a king. Thus the Law is what is called the true. And if a man declares what is true, they say he declares the law ; and if he declares the law, they say he declares what is true. Thus both are the same.”

*Bṛihadaranyka, I. 4, 14.*

In the Hindu Dharmasastras, as in the Homeric poems, one of the chief duties divinely entrusted to a king is the faithful and impartial administration of the laws of his country. Contrary to the theory of the modern jurists, these laws were not held to be the outcome of sovereignty, but were treated as of celestial origin, while the ideal king himself was accounted semi-divine. “For if the world had no king” says Manu (Chapter VII, verse 3), “it would quake in all directions through fear, the ruler of this universe, Brahma, therefore created a king for the protection of this whole creation, both religious and civil, forming him of eternal particles drawn from the substance of Indra, Pavana, Yama, Surya, of Agni and Varuna, of Chandra and Kuvera : and since a king was composed of particles drawn from those chief guardian deities, he therefore surpasses all mortal beings in lustre. Like the sun he burns eyes and hearts ; nor can any body on earth even gaze on him. He is both fire and air ; he, both sun and moon ; he, the Lord of justice, he Kuvera (the genius of wealth), he Varuna (the regent of waters), he Indra (the lord of the firmament). Even an infant king must not be

\* Read at a literary meeting of the Cottage Library and Bhowanipur Institute, 19th of May, 1916.

despised from an idea that he is a mere mortal ; for he is a great deity in human form." This doctrine of the origin of sovereignty is coupled with the theory, that the laws which the king ought to administer are entrusted to him by divine commission. The Homeric conception of kingly office, scarcely differs from this early political creed of Manu, the greatest of the Hindu law-givers. In the second book of the Iliad, when Ulysses, at the behest of Minerva, warns and remonstrates with the Greeks, he refers to the king as one to whom alone Jupiter has entrusted a sceptre and laws that he may govern them. Although the Homeric king appears also in the character of a judge, the Iliad portrays him most fitly as a military commander. On the other hand, the ideal king of Manu, though a martial chief, is more prominently a father to his people and a wise and humane dispenser of justice. It is remarkable however, the earliest descriptions we have of a judicial tribunal, point unmistakably to the fact that the primitive society referred the determination of its disputes, not to a single judge or arbitrator but to large assemblies of judges. Thus the Athenian law of the classical period was essentially a popular not a technical body of rules. It represents the most striking experiment in history to administer law according to the standards of the "average man" as to equity and justice. The commissions of *heliasts*, the sworn judges of the courts, number some 200, 500 or 1000 citizens who had to decide by vote after hearing the pleadings but without previous debate among themselves. In these circumstances, no doubt the action of the tribunals was often extremely capricious and swayed by merely emotional considerations, e.g. *Lykurgus* in *Leochareum*. But the real wonder is not that these defects existed, but that in spite of them the administration of justice was of such a kind as to produce not only fine oratory, but remarkable juridical ideas. One of the scenic adornments which the artist God *Hephaiston* devised for the famous shield of *Achilles*, is the well-known picture of a judicial trial which affords a glimpse in a state of society, the very earliest probably which the Iliad depicts. The contention is with reference to the payment of a fine or money-compensation for a homicide. One party declares he has paid it, while the other denies the fact and witnesses are arraigned on both sides. The people raise a clamour and the heralds silence them, while the assembly of elders, who are the judges sit in a circle to decide the cause. This picture of a judicial trial where the dispute is referred to the arbitrament of a council of judges, is a fit representation of the actual constitution of judicial tribunals among the early Greeks and Romans. The *Cetumviral Court*, probably

one of the oldest of the Roman institutions, was composed of representatives chosen from among the various tribes ; and at the time of Pliny the Younger, formed a Council of no less than 180 members. Like the Court of Areopagus, its members considerably increased, as tribe after tribe was admitted to a share in the administration of public affairs. It was the same among the Hebrews, who represented the highest Semitic development. Whatever may have been the date of the institution of Sanhedrim, it is certain that a supreme Court, consisting of 70 Judges existed among them from the earliest times.

Turning now to the Hindu Aryan race, we find the sage Narada laying down in his Smritis, the rule that "in every law-suit, several persons conversant with many sciences must be appointed to try the case ; a prudent man should not trust a single individual however virtuous." In accordance with this rule, the early Hindu Courts of justice were practically composed of large assemblies of Judges. No less than five or six different tribunals existed among them, each having superior jurisdiction to the other and terminating with the king's bench, consisting of a Judge of high attainments and learned assessors of the sacerdotal caste.

The Hindu law books give but a meagre account of the ancient tribunals of India, but such information as we do possess on the subject is extremely valuable for the purpose of judging of the early progress of the Hindu Society. In the celebrated Code of Manu, the Magna Charta of Brahmanism, it is laid down that if the king does not personally investigate the suits, then let him appoint a learned Brahmin to try them. The Brahmin shall enter that most excellent court of justice accompanied by three assessors and fully consider all causes brought before the king. Side by side with this Supreme Court however, we find inferior tribunals of the most rude and primitive character, which probably mark distinct stages in the advances made by the Aryan Community in India, among which they sprang up. Three of these are most remarkable, and are undoubtedly of the highest antiquity—(1) the *Kula* or the assemblies of kinsmen, (2) the *Sreni* or the assemblies of fellow artizans—a sort of Trade-union and lastly (3) the *Puga* or the assemblies of townsmen. Villages, tribes and castes have also tribunals of their own, corresponding to the modern *panchyats* ; and from these an appeal to the king is possible. Thus it is said in the Chapter IX, verse 234 (Manu) that whatever matter his ministers or the judge may settle improperly, that the king himself shall resettle and fine them 1000 panas. The system of appeals was well understood by the



Hindu jurisconsults from the earliest times. A decision lay from the decision of kinsmen to a meeting of fellow-artizans and companies of artizans ; co-inhabitants and courts of justice writes Vrihaspati are declared to be judicatories to which he against whom judgment is given, may successively resort. A cause which has not been thoroughly investigated by the kinsmen must be tried by the persons of the same guild ; one who has not been well-adjudged by fellow-artizans, should be revised by the townsmen ; and what exceeds the compass of their understanding must be heard by appointed judges, as already noticed. The chief judge, writes Colebrooke, assists the prince when present or presides in court when he is absent. The proper title of this high officer is Dharmadhyaksha or Superintendent of justice. It occurs in the rubric and colophon of diverse treatises on Hindu Law, as the officer's official designation, especially in the Halayudha. The Dharmadhyaksha must be a learned Brahmin and according to Katyayana, perfectly conversant with sacred literature, patient, sprung from a good family, impartial, deliberate, firm, awed by the dread of another world, virtuous diligent and placid. When the king tries the causes in person, this officer is his colleague in the administration of justice ; but when he is unable to inspect judicial affairs himself by reason of other urgent business or through want of health, the chief judge is his representative. Like the Areopagites who were forbidden to write a comedy and whose gravity became a proverb among the Greeks, the Hindu king as a judge was bound by law to preserve the dignity of the office. The more recent law-books mention a number of other members of the court of justice besides the king, the king's domestic priest, his ministers of state, the assessors of the court, who are required to state their opinion of the case unreservedly and in accordance with the dictates of justice, the accountant, the scribe, the beadle. The assessors were not to exceed 7 nor to be less than 3, in number. This rule however does not seem to have been strictly adhered to. In the interesting picture of an ancient Hindu trial, there appears to be only one assessor. The picture is to be found in the old Sanscrit play, Mriccha-katika or the "Clay-Cart" where the judge is assisted by the provost or the head of the merchants and by a recorder or scribe who writes down all the charges and the evidence. The duty of the court is confined to the investigation of facts. It is supposed to ascertain whether the party is guilty or not guilty and then to report the proceedings to the king, who alone pronounces sentence. The charge in the play is that of murder, and the judge is inclined to assert the authority and

maintain the independence of his court, but he is at the same time unwilling to offend the prince, who is supposed to exercise indirectly a paramount influence over the king. It appears also that he is inclined to favour Charu Datta, the Brahman hero of the play partly because of his high caste and partly because the character of the prince is known to be despicable, whilst that of the Brahman hero stands high in public estimation (*vide* H. H. Wilson, "The Theatre of the Hindus.")

Passing to the Criminal Law, we find the suppression of crimes was recognised as a sovereign and sacred function of the king. There are hardly any survivals left of the right of the private war or of the wergild, during the period during which the aphoristic treatises such as Baudhyayana, Apastamba, Gautama, Vasistha and Vishnu were composed; for otherwise the right of trial by kinsmen would not have been laid down as one of the lawful modes of securing justice. The removal of thorny weeds (Kantaka-Sodhana) *i.e.*, the suppression of criminals is regarded as one of the principal duties of a ruler. Legal offences are also moral sins and kings by punishing the wicked and protecting the virtuous obtain their own absolution. Punishment is personified as a God. A king in whose dominions there are no thieves, adulterers, calumniators, robbers, murderers, after death attain the world of Indra. Abuse, assault, theft, robbery, violence including manslaughter and sexual crimes are regarded as the principal crimes. Fines are the most common form of punishment, but there are many other forms. Barbarous cruelty, the prevalence of *lex talionis* and want of system, characterise the Indian as well as other primitive Codes. Death is prescribed by Manu for aggravated theft, for harbouring robbers, swindling and kidnapping, for certain cases of adultery and insult—in short in a great many more crimes than under more balanced systems. Death by torture was the punishment for a dishonest goldsmith and mutilation that of the destroyer of a boundary mark—which shows how great was the alarm at their offences. Although the judges like the jurists, were generally Brahmins, it appears doubtful, whether the privileges claimed by the sacerdotal class and incorporated with legal rules were actually accorded to them. Many of their rules belong to the moral sphere and go beyond what we recognise as the proper province of the penal law. Excessive drinking is punished as a crime in itself, not only as a breach of public order. Gambling is viewed in the same light. The King has to fast for one whole day if a criminal deserving punishment is allowed to go free and for

three days if an innocent man is punished. In giving a decision, the king must attend local usage, written and practice of the virtuous, if not opposed to local, family or caste usages. But there is no essential difference between the trial of civil and criminal suits, except perhaps that the character and other qualification of a reliable witness are not examined so strictly in criminal cases, as in the civil ones and that the defendant in a criminal case cannot be represented by a substitute. The litigants must always be heard in person and the king or the judge watches their countenances and their conduct carefully. Witnesses are watched too in the same way and depositions of witnesses being regarded as the most important part of evidence. Certain persons are not admissible as witnesses on account of their personal relations with the litigant parties, or on account of age, dignity, sex, devotion to religion, moral or personal defects. There are also some provisions as to the number of witnesses as that there shall not be less than three. In the event of a conflict of testimony, that of the majority generally prevails. The witnesses are solemnly adjured to speak the truth; and if should happen to meet with a calamity within 7 days after making their deposition, this is held to prove its falsehood. Perjured witnesses are severely punished and have to endure fearful pangs in a future existence and to destroy their own relatives through their wickedness. Perjury however is tolerated, where an accused person may be saved from death by it. The later law-books give special prominence to documents and make written prevail over oral evidence, the plaint and the answer of the defendant, having likewise to be stated in writing. The trial is to be conducted discreetly and skilfully, for liars may have the appearance of veracious men and veracious men may resemble liars or documents may be forged. If human proof should fail, divine test should be resorted to, of which there are many kinds, such as the water and fire ordeals, the ordeal by poison, the ordeal by hot-metal (a gold coin has to be taken out of a vessel of boiling water), the ordeal by drawing lots and the ordeal by sacred libation. The dieties are invoked to supervise these proceedings and are believed to establish the innocence or guilt of the accused. In less important cases oaths are to be administered. The custom of performing ordeals has survived down to a very modern time, and oaths by an idol, Brahman, etc., are even now in vogue. The decision of a judge in a suit is to be stated in writing and a copy of it is to be handed to the victorious party. "When the law-suits are decided properly, the members of the courts are cleared from guilt. But where justice, wounded by injustice, approaches, and the judges

do not extract the dart, then they are also wounded by that dart of injustice" (Narada p. 7 ; Manu, Chapter VII, 12).

Hindu Law like the Babylonian Law naturally was based on custom. The origin of such custom however, is often hidden from us in the mists of antiquity. We may legitimately argue back from historic conditions to the pre-historic implications but the methods usually adopted are mere guesses in the dark. And like all ancient laws, at a somewhat later stage of civilisation the Hindu law-giver invokes the authority of the gods for his legislation. The Mosaic Law is ascribed to Jahveh ; Hammurabi, the greatest king of the First Babylonian Dynasty receives his celebrated Code from Shamash, the Sun-God ; Minos is instructed by Zeus. In this way the general acceptance and permanence of the law would be secured by investing it with the sanctity of religion. The sources of the sacred law of the Hindus, according to Manu, consist of the whole Veda, the Smriti or its tradition, the customs of the holy men and self-satisfaction where there is no other guide. The four Vedas together with auxiliary literature *e. g.*, Brahmanas and Sutras, all of which is believed to be eternal and inspired, are confined to the consideration of religious rites and contain very little about secular law, though they are considered the fountain head of the whole law. Dharmasastras or Smritis are the real sources of law from a legal point of view. The term Smriti means literally "recollection" and is used to denote a work or the whole body of Sanscrit works in which the sages of antiquity set down their recollections of the divine precepts regarding the duty of man. In reality the earliest law-books were composed in and for the Brahmanical Schools studying the various parts of the Veda and have been preserved as portions of manuals of Vedic lore used in those schools or as independent works. Such compositions are the Dharmasastras or Dharmasutras of Apastambha Gautama, Baudhayana, Vasistha, Vishnu and some others. They are composed in the aphoristic sutra style, either entirely in prose or more usually in mixed prose and verse. Some of these works are supposed to have been written in the 5th or 6th century B. C. or even earlier and they may have undergone many changes since then. Their contents are mainly religious, but the positive law is also treated in them and they are very useful in tracing the gradual development of legal institutions in India. From these aphoristic treatises, we pass to the versified works composed in the sloka metre, such as the celebrated Institutes of Manu ; the Code of Yajnavalkya distinguished for its concise and systematic treatment of the whole law in three books on *achara i. e.*, religious rites and duties, *vyavahara i. e.*,

jurisprudence and *pryaschitta i. e.*, sins and their atonement and the Code of Narada unique in its being confined to jurisprudence alone, which it treats with great fulness of detail.

We have already noticed that there were mainly three sorts of judicial tribunals spoken of by the Brahminical law-writers, we have separate courts in regular gradation, commencing with the Court of King's Bench and terminating with the assemblies of kinsmen. According to Narada, Vyasa, Vrihaspati and other writers, "places of resort" for the determination of disputes are as follows :

(a) The Court of the Sovereign, who is assisted by learned Brahmins or assessors. Nārada says "taking the sacred code of laws as his guide and deferring to the opinion of the chief judge, let the king deliberately and regularly investigate judicial proceedings." This court is ambulatory.

(b) The tribunal of the Chief Judge (Pradvivaka or Dharmadhyaksha) appointed by the sovereign sitting with three or more assessors, not exceeding seven. The term Pradvivaka or chief judge, is etymologically appropriate. He interrogates the plaintiff and defendant : hence is derived by grammatical rules the active participle *prad*, the interrogator. With the assessors he weighs or investigates the truth or falsehood of their assertions : hence is derived *vivak*, the investigator : hence by the compound he is termed *pradvivak*. It is said, "He who with the assessors, carefully inquires into the subject matter and investigates the point at issue is termed the *Pradvivaka* or Chief Judge" (Vyasa).

His duties are thus described in the Sukraniti :

"The Pradvivaka along with the members of the jury sitting in a meeting may ascertain by majority of opinion what sort of cases either instituted by the state or brought before the court were subject of proof—by witnesses, documents, past and adverse enjoyment—and in what cases divine proof (oaths, ordeals) was to prevail, where interpretation was to be allowed, where matter was to be proved by direct evidence (प्रत्यक्ष), where inference (अनुमान) and analogy (उपमा) were to be resorted to, where community and where jurisprudence should be followed ; and the Pradvivaka then may always advise the king accordingly." *Sukraniti II*, 96-98.

This is a stationary court.

Gauranga Nath Banerjee,  
Vakil, High Court.

(To be continued.)

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## THE TRIBUNALS IN ANCIENT INDIA.—(*Concluded.*)

(c) Puisne judges, appointed by the sovereign's authority for local jurisdiction. From their decision an appeal lies to the Court of the Chief Judge, and thence to the king in person.

Thus we find that the administration of justice was, during the period when Hindu sovereigns flourished in India the privilege of the king, but his increasing responsibilities and the ceaseless attention he had to pay to the securing of his kingdom from the attacks of the enemies, made it necessary for him to appoint some person who would share the work with him and the post of the Dharmadhyaksha and the Magistrate were in consequence created. The work entrusted to the latter officer were chiefly criminal, and the duty of the Dharmadhyaksha also appear to be of the same kind, for it is mentioned in verse 105 of the Chapter V of the Sabha Parbha of the Mahabharata that thieves and other offenders were sent to him with the things stolen. In the matter of crimes, a book entitled Samavidhana Brahmana and giving a list of crimes had been compiled at an early age, but it provided for the expiation of crimes by religious ceremonies and it was thus not of much use. As was natural, the king sometimes went astray and we therefore find Bhishma advising Yudhisthira as follows :—"Take no secret money for the decision of a case in some one's favour ; otherwise sin will overtake you. The people will flee from you, as birds fly from an eagle and the kingdom will go to ruin. The king ought always to give redress to the weak man who is oppressed by a stronger man and who comes crying for justice. If the defendant denies, then decide on the strength of the witnesses. Where there are no witnesses or no defendants, then you shall have to decide with great care. Award punishment commensurate with the crime. Inflict fines on rich men, imprisonment on the poor and stripes on the ill-behaved. He who murders a king should be killed in a terrible fashion, so also

an incendiary, a thief and a defiler of caste." But the general honesty of the people and the efficient administration of the criminal law are both attested by the observation recorded by Megasthenes, who resided as the ambassador of Seleucus Nicator in the Court of Chandragupta about the beginning of the 3rd century B. C. He recorded in his *Indika* that while he resided in Chandragupta's camp, containing 400,000 persons, the total of the thefts reported in any one day did not exceed 200 drachmai or about Rs. 120. Arrian also states that no Indian could be accused of lying; but it is permissible to doubt the strict accuracy of the statement, although it is certainly the fact that the people of Ancient India enjoyed a widespread and enviable reputation for straight-forwardness and honesty. The Chinese, who came next in order of time, bear the same unanimous testimony in favour of the honesty and veracity of the Hindus. Let me quote Hien Tsang, the most famous of the Chinese Buddhist pilgrims who visited India in the seventh century A.D. "Though the Indians" he writes, "are of a light temperament, they are distinguished by the straight-forwardness and honesty of their character. With regard to riches, they never take anything unjustly; with regard to justice, they make even excessive concessions...straight-forwardness is the distinguishing feature of their administration." If we turn to the accounts given by the Mahomedan conquerors of India, we find Idrisi in his Geography (written in the eleventh century A.D.) summing up their opinions about the Indians in the following words: "The Indians are naturally inclined to justice and never depart from it in their actions. Their good faith, honesty and fidelity to their engagements are well-known, and they are so famous for these qualities that people flock to their country from every side." In the 13th century we have the testimony of Marco Polo, who thus speaks of the Abraiaman, a name by which he seems to mean the Brahmans who though not traders by profession, might well have been employed for great commercial transactions by the king. This was particularly the case during times which the Brahmans would call times of distress, when many things were allowed which at other times were forbidden by the laws. "You must know," Marco Polo says "that these Abraiaman are the best merchants in the world, and the most truthful, for they would not tell a lie for anything on earth."

Now it is quite true that during the two thousand years which precede the invasion of Mahmud of Ghazni, India has had but few foreign visitors and fewer foreign critics; but still it is surely extremely strange that whenever either in Greek, or in Chinese or

in Persian or in Arab writings we meet with any attempts at describing the distinguishing features in the national character of the Indians, regard for truth and justice should always be mentioned first. Even so late as the 16th century A. D. Abul Fazl, the minister of Emperor Akbar says in his *Ayeeen Akbari* : "The Hindus are religious, affable, cheerful, lovers of justice, given to retirement, able in business, admirers of truth, grateful and of unbounded fidelity ; and their soldiers know not what is to fly from the field of battle."

Thus far we were dealing with the administration of Hindu Law in Ancient India, when we go up to the Buddhistic period, we find that in the strict sense of the word, there is no Buddhist Law ; there is only an influence exercised by Buddhist ethics on changes that have taken place in customs. No Buddhist authority whether local or central, whether lay or clerical, have ever enacted or promulgated any law. Such law as has been administered in countries ruled over by monarchs nominally Buddhist has been custom rather than law ; and the custom has been in the main pre-Buddhistic, fixed and established before the people became Buddhist. There have been changes in the custom. But the changes have not been the result of any enactment from above. They have been brought about by change of opinion among the people themselves. The Buddhists, for instance, had from the beginning what we term their canon law, what they called *Vinaya i.e.* Guidance. It consists of 227 Rules to regulate the conduct of the members in outward affairs and some supplementary Chapters on special subjects. These "articles of association" are quite apart from Buddhist religion and indeed have little or nothing that is specifically Buddhist. Now, just before the rise of Buddhism, there was quite a number of such Orders. The names of ten of them are preserved in the *Anguttara*. But only one of these pre-Buddhistic communities has survived—viz. that of the Jains. But there is nothing in the 227 rules of the *Vinaya* which would be included under the English term "law" in its modern sense. In the explanations and applications, however of the rules, as interpreted in the Chapters of the Order, when a particular case came up for decision, there is a good deal of what we should now call case-law. For example, Rule No. 3 is as follows : "Whatsoever Bhikkhu shall knowingly deprive of life a human being, or shall seek out an assassin against a human being or shall utter the praises of death or incite another to self-destruction, saying "Ho ! my friend, what good do you get from this sinful, wretched life ? Death is better to you than life !"—if so



thinking and with such an aim, he by various argument, utter the praises of death or incite another to self-destruction he too, is fallen into defeat, he is no longer in communion." In fact, the penalty for the gravest kind is exclusion from the Order; that for the lesser kind is suspension in varying degrees, and for varying duration.

Prof. Dr. Hermann Oldenberg in his introduction to his edition of the Vinaya Texts, has carefully considered the manner in which these documents enshrining the Buddhist Vinaya were gradually built up, and their approximate date. He concludes that the whole text, as we now have it, was in existence within a century of Buddha's death; and that much of it is older and may go back to the generation in which Buddhism arose. It will be seen at once that this is quite modern, compared with the Hammurabi Code of customary law. Such value as these Buddhist documents have in the history of law depends upon their being the oldest legal texts which apply the principles of equity to the problems to be solved. They do not pretend to put forward any code of law. They belong to a stage beyond that and only attempt to utilise for the practical requirements of an association of co-workers the results of previous thoughts on legal points.

The administration of this law (if law it can be called) was very simple. The decision lay with the Chapter or Sangha which was composed of all members of the order, resident within a certain boundary. The Boundary, also fixed by the Chapter was so arranged as to secure the possible attendance of from a dozen to a score of members. All the members were equal, and the Senior member presided. If the matter came to a vote which seldom happened the voting was by ticket. Complicated matters were referred to a special Committee for report and the decisions in most cases were unanimous. The Chapters had no authority to settle any matters not included in the Vinaya or to deal with property not the property of the Order. All such matters were the province of the state, to be settled according to the customs of each locality. They were regarded as secular, not religious. Thus customs as to marriage and divorce, the inheritance and division of real or personal estate, the law of contract and criminal law, were all purely secular matters to be determined by the sense of the lay Community. This continued to be the attitude of the mind of the Buddhists, throughout their long and varied history.

We do not propose to notice this subject at greater length as the incidental extracts from the text-books of Hindu and Buddhist Law given above, will suffice to show the character and value of the

tribunals and administration of law in Ancient India. The ancient Indians were in many respects a most remarkable community with a social organisation of far more elaborate structure and cohesion than either the Roman or the Tuntonic polity. Should the labours of historical jurists ever succeed in re-discovering and re-constructing the lost records of this community, the result, we feel sure, will far exceed in interest and importance the records of any other people on the earth, not excluding the Greeks, for in no society have moral ideas been more consciously and consistently worked out in practice than in ancient India. *Ex Oriente Lux !*

*Gauranga Nath Banerjee,*

Vakil, High Court.

## PARENTAL RIGHTS—(*Contd.*)

### III.

Whatever may be the parents' power or privileges with regard to their children's religious education, all authorities agree that a parent may by his acts or conduct forfeit, abandon, or waive such parental rights (1). No definite rule can be given as to what will amount to such abandonment, abdication, or forfeiture. It is a question of fact and will vary according to the infinite diversity of circumstances. Indeed there is perhaps no situation which has betrayed the judiciary to yield to its own religious prejudices, so subtly as the issue of parental abandonment in the face of rival religious claims between parents or relatives over some poor child who had been made the object of religious zeal. No mere agreement as to the religious education of children between father and mother before or after marriage is binding and it is always open to either parent to change his mind, as it is his privilege to inculcate upon his children those religious principles which for the time

(1) *Witty v. Marshall*. 1 Y. & C. 68 (1841); *In re Clarke*, L. R. 21 Ch. D. 817 (1882); *In re O'malley*, 8 Ir. Ch. 291 (1858); *In re Grimes*, 11 Ir. Eq. 465 (1877); *In matter of Garnett* 20 W. R. 722 (1872); *Hill v. Hill* 31 L. J. (Ch.) 505 (1861).

being seem to him best (1). Some decisions base this fundamental principle on a public policy that a parent in the interest of morality should not be held to bind himself conclusively to relinquish control over his children's religious education. Especially must this appeal to those who regard this right as vested in the parents solely for the benefit of their children. Other authorities, however, rest these decisions rather on the practical conditions arising out of ordinary family life.

"Who is to provide the funds to educate the children in a religion which the father objects to? Is the Court, to apply the property of the husband, during his lifetime, and against his will, to the education of his child in that form of religious faith from which he conscientiously differs, and the adoption of which by the child he believes will be destructive to his eternal welfare" (2)?

It is further pointed out that for breach of a contract of a parent concerning the religious education of a child no damages can be recovered and it cannot be enforced by a suit for specific performance (3).

Whatever view one adopts of the right of parental control over a child's religious education it is evident that irrespective of good faith and well-intentioned efforts there must be certain well-defined limits restraining its capricious exercise. Once the religious education of the child has progressed so far that definite religious ideas have been impressed upon its mind to the extent that a change would unsettle its tranquility and disturb its mental poise, the parents are precluded from further interference with the continued development of that religious education which the child had thus acquired (4).

In this connection arises one of the most perplexing questions involved on this subject, and one on which there is, perhaps, the clearest conflict of authority. How is the child's religious development to be ascertained and the possible injurious effect of a change determined? The obvious answer is to hale the child before the Court and to have the judge satisfy himself by an examination of the

(1) *In re Agar-Ellis*, 24 Ch. D. 317 (1883); *In re Nevin*, [1891] 2 Ch. 299; *In re Meades*, 5 Ir. R. Eq. 98 (1870); *In re Browne*, 2 Ir. Ch. 151 (1852); *In re Clarke*, L. R. 21 Ch. D. 817 (1882); *Andrews v. Salt*, L. R. 8 Ch. App. 622 (1873).

(2) *In re Browne*, 2 Ir. ch. 151, 160 (1852).

(3) *Andrews v. Salt*, L. R. 8 ch. App. 622 (1873).

(4) *Hawksworth v. Hawksworth*, L. R. 6 ch. 539 (1871); *Stourton v. Stourton*, 8 DeG. M. & G. 760 (1857); *In re Agar-Ellis*, 24 ch. D. 317 (1883).

child either in open Court, in chambers, or by a master in Chancery or similar official under such conditions as shall give a fair opportunity to size up the child. This has been the course adopted in perhaps a majority of the cases (1). In certain cases this may be done without serious danger (2), but a careful analysis of the cases is convincing that it is a dangerous practice and open to very serious objections. Perhaps nothing can be added to the summary by Judge Owen of the New South Wales Court of the evils and defects of this procedure :

“The reasoning both of the Vice-Chancellor and of the Lords Justices in that case (*Hawksworth v. Hawksworth*) satisfies my mind that any such examination would be a mere form, and might lead to injurious results. No doubt the child here is 13 years old, whereas the age of the children in the cases cited was only 9 years, but I cannot suppose that a girl of 13, unless brought up in a proselytising school and prematurely instructed in matter of doctrinal controversy, as to which there is no evidence, can hold or be capable of forming any opinion worth considering on the matters in controversy between the two characters. Even if she had been so instructed, she might have caught the shibboleths of a party, or some of the current phrases of controversy, but of the controversy itself she could form no intelligent opinion. Subjects that held in doubt for many years the powerful and acute intellect of a Newman are outside the intellectual gauge of a girl of 13 ; nor can a child of that tender age, however well educated, have touched even the fringe of the learning necessary to form an intelligent opinion on so vast and complex a subject. I might find sentiment or prejudice, or dislike to any change in religious education, but the Court cannot allow such to interfere with its duty of seeing that the child is educated in the religion of her father. Nor do I consider upon principle, that a Judge who may be of any religion, or of no religion, is a fitting tribunal to ascertain the religious views of a child of tender years. The law, which is absolutely impartial in matters of religion, has to

(1) *Hawksworth v. Hawksworth*, L. R. 6 ch. 539 (1871); *Skinner v. Orde*, L. R. 4 P. C. 60 (1871); *F. v. F.*, [1902] 1 Ch. 688; *In re Newbery*, L. R. 1 Eq. 431 (1865); *Stourton v. Stourton*, 8 DeG. M. & G. 760 (1857); *Andrews v. Salt*, L. R. 8 ch. App. 622 (1873); *Witty v. Marshall*, 1 Y. & C. 68 (1841); *In re Grimes*, 11 Ir. R. Eq. 465 (1877); *In re Elliot*, L. R. 32 Ir. 504 (1893). *Davis v. Davis*, 10 W. R. 245 (1862); *In re Meades*, 5 Ir. R. Eq. 98 (1871);

(2) Where a child was of such age that within a year she “would have a right to act on her own views” obviously her wishes should be considered by the Court. *Queen v. Gynghall*, [1893] 2 Q. B. 232.

be administered by Judges, who like other men, are liable to be swayed by their own views on this, the most important and most difficult subject that can engage the mind of man. They, as others, are to be found ranged on either side of the great controversies that have split christendom into hostile camps. The judge, if he entertains strong views on the subject, is liable, however he may desire to be fair and impartial, to have his judgment warped by an intense conviction of the truth of his own particular opinion, or by his disapproval of the teaching of the church to which the child's father belonged. If he is indifferent, or holds views now known as agnostic, his examination must be equally, if not more, unsatisfactory. I also attach great weight to the opinion of the Judges in *Hawksworth v. Hawksworth*, that if it were known that the Court would examine a child as to its religious views, before deciding in what religion it was to be brought up, a mother, or guardian, might be induced to begin prematurely to teach the child the subjects of controversy between particular churches, so as to prepare it for such examination. There are cases, no doubt, in which a child has from infancy until years of discretion been brought up in one particular form of religion, where the Court may consider it dangerous to compel such child to be brought up in a different and conflicting religion, lest the diverse and conflicting teaching should make shipwreck of the child's faith, and impair its moral character...." (1)

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(1) *In re Butler*, 6 N. S. W. W. N. 10, 10-12 (1889). See also *Reg. v. Clarke*, 7 E. & B. 186 (1857).

"But an interview of a few minutes between a girl under nine years old and a stranger could hardly lead to my coming to any conclusion like that which the Lords Justices arrived at in *Stourton v. Stourton*. That decision may have been, and probably was, right with reference to the case of a very unusual child; but I cannot help fearing that it has done some harm. I fear it may have led widowed mothers, in breach of their duty, and to the great injury of their children, to introduce them prematurely into an atmosphere of theological controversy, than which nothing can be more injurious to the mind and heart of a child, and this, it will be observed, for the purpose of convincing them that their dead father had wrong views. In the present case I knew that although I might be bound to give the ward an opportunity of speaking to me privately, the interview must necessarily, under the circumstances, be a form, and it was a form. I did not obtain, and, in fact, I did not in any way try to elicit, any opinion from her as to the questions between the churches. If I had thought that the child had been brought up to keen and premature consciousness of the true bearing and meaning of those questions I should have formed a much less favourable opinion of the mother than I actually formed. As it is, however much I may regret the conclusion, the law must prevail, and the child must be brought up in her father's faith." *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539, 540-1 (1871).

(To be continued.)

# The Calcutta Law Journal.

VOL. XXIV. }

CALCUTTA, AUGUST, 16, 1916.

{ No. 4.

## IS AN APPLICATION FOR MESNE PROFITS AN APPLICATION FOR EXECUTION ?

Under the Civil Procedure Code of 1882, there was a great divergence of Judicial opinion as to whether an application for assessment of mesne profits is an application for the execution of a decree or an application in the original suit. It is absolutely unnecessary for the purpose of our present discussion to mention the various decisions on the subject or to comment on their respective authority, because the Full Bench case of *Puran Chand v. Roy Radha Kishen* (1), may now be taken as setting at rest all controversy on the point by superseding and overruling all the previous decisions that maintained an application for the determination of mesne profits to be an application in execution of a decree. In this case it has been authoritatively laid down that the proceedings in determining the amount of mesne profits are not proceedings in execution of a decree in regard to *any fixed sum*, but merely a continuation of the original suit carried on in the same way as if a single suit were brought for mesne profits by itself. This confusion between a proceeding in the original suit and a proceeding in execution might have originated from the previous practice of leaving the amount of mesne profits to be determined by the Court in its execution department. Whatever cause might have led to this legal uncertainty, there is now, after the case of *Puran Chand* (1), no room for any controversy that an application for assessment of mesne profits is an application for the execution of a decree. Since the said Full Bench case it has been repeatedly pointed out by our Courts that proceedings for ascertainment of mesne profits are but a continuation of the original suit and are not proceedings in execution; see *Kewal Kishan Singh v. Sookhari* (2); *Pryag Singh v. Raju Singh* (3); *Harmanojee Narain*

(1) (1891) I. L. R. 19 Calc. 132.

(2) (1896) I. L. R. 24 Calc. 173.

(3) (1897) I. L. R. 25 Calc. 203.

*Singh v. Ramprosad Singh* (1); *Midnapore Zemindary Co. Ltd. v. Narresh Narain Roy* (2); *Upendra v. Sakhi Chand* (3).

The conflicting views in the earlier decisions might have perhaps been occasioned by clauses (a) and (b) of section 244 of the Code of 1882 which dealt with execution-matters. These two clauses related to the questions regarding the amount of mesne profits and were accepted as directing that an application for ascertainment of mesne profits should be entertained by the Court in its execution department. It is worth our while to notice that these clauses (a) and (b) have been omitted from section 47 of the present Code (1908), which corresponds to the old section 244. From the Report of the Select Committee appointed to consider the amendment of the Code of Civil Procedure we get the reason or object of such omission. The Committee have omitted the clauses (a) and (b) of section 244 of the old Code because they were strongly of opinion that questions regarding the amount of any mesne profits or interest should be determined by the decree and not in execution. This view has also been given effect to by the Legislature by the appendage of a new sub-rule (2) to O. XX. R. 12 which represents sections 211 and 212 of the old Code. This sub-rule runs thus : "(2) where an enquiry is directed under clause (b) or clause (c) of O. XX. R. 12 a *final* decree in respect of the rent or mesne profits shall be passed in accordance with the result of such enquiry." The words *final decree* in this sub-rule imply that in a suit for the recovery of possession of immovable property and for mesne profits, the Court has first to pass a preliminary decree (within the meaning of the *explanation* to clause 2 (2) of the Civil Procedure Code of 1908) allowing the claim for mesne profits and directing an enquiry for the ascertainment of the *exact* amount thereof. A preliminary decree, as is well known, does not finally dispose of a suit ; further proceedings have to be taken on it before the suit can be completely and finally disposed of. Consequently it is obvious from the above sub-rule that an application for the ascertainment of the amount of mesne profits is but an application inviting the Court to hold an inquiry in accordance with the *preliminary* decree, and completely to dispose of the suit by passing a *final* decree. Therefore, whatever might have been the law on the subject prior to the Civil Procedure Code of 1908, it will be now too late to contend that an application for assessment of mesne profits is an application in execution, and to maintain so will now undoubtedly be a violation of the existing law.

(1) (1907) 6 C. L. J. 462.

(2) (1911) I. L. R. 39 Calc. 220.

(3) (1912) 16 C. L. J. 3.

In this connection two questions naturally confront us—(1) Granted that an application for ascertainment of mesne profits is an application in the original suit, is there any time-limit within which such an application is to be made? (2) Does a second application for assessment of mesne profits lie after a previous application for the purpose has been dismissed or rejected for the decree-holder's laches or for any other reason? So far as the first question is concerned, the trend of modern decisions seems to be against any time-limit. The Full Bench case of *Puran Chand* (1) above referred to, seems to have considered the question of limitation, and to have held that there is no fixed limitation within which a decree-holder is to apply for assessment of mesne profits. The learned judges in so holding proceeded on the reasoning that so long as the final decree is not passed, the suit is pending before the Court; and there being no provisions in the Code compelling a person having the conduct of a pending suit to make formal applications from time to time asking the Court to proceed to a judgment, the decree-holder can come at any time to invite the Court to assess the exact amount of mesne profits payable to him and then pass a final decree in his favour for the amount so assessed. This view has one practical difficulty in its way, because it prolongs the period of pendency of a suit to an indefinite term and makes such pendency determinable only at the caprice of a decree-holder. Conscious of this natural inconvenience the Judges of the Full Bench have empowered the Courts to hold, of their own motion, an enquiry for the ascertainment of mesne profits and fix an early date for the purpose, and after hearing the parties and framing such issues as might be necessary, to proceed on with the suit. But unfortunately this salutary direction is seldom followed by our Mofussil Courts, and consequently considerable difficulty is experienced. It may be asked when the Court does not of its own motion so fix an early date, (inasmuch as the Court is not bound to direct an enquiry under O. XX, R. 12), can a decree-holder take advantage of the Court's omission to argue that the suit has been eternally pending for him so as to afford him an opportunity to come after the lapse of any great length of time with his application for ascertainment of mesne profits? Whatever might be the judicial opinion on this point, it is certain that such a view is wholly destructive of the fundamental principles of the law of limitation which is based on the theory of loss of evidence by lapse of time. If a decree-holder sleeps over his rights for a long time and comes to Court after an indefinite period the interests of a judgment-

(1) (1891) I. L. R. 19 Calc. 132.



debtor may seriously be affected inasmuch as some of the latter's likely witnesses may be dead in the meantime, or, some of his valuable evidence may otherwise be lost. This point was specifically raised for decision in the case of *Pryag Singh v. Raju Singh* (1); and therein their lordships overruled the contention for a time-limit apparently on the ground that the law did not provide for any such limitation, and that unless there was a limitation prescribed by the Legislature, their lordships could not create one. This view necessarily leads us to the question whether the aforesaid delay of a decree-holder can be brought under the bar of any of the articles of the Limitation Act. In the Full Bench case of 19 Calc., 132, it has been held that neither article 178, nor article 179, of the Limitation Act, 1877, applies to an application to ascertain the amount of mesne profits awarded by a decree. These articles 178 and 179 of the old Limitation Act are now represented by articles 181 and 182 of the Act of 1908. Of the two articles the latter deals with execution matters, and will necessarily be inapplicable to the applications in the original suit. As to article 181, we fail to see why it will not apply to an application for ascertainment of mesne profits; but the above Full Bench case has negatived this view and we are bound by authority. There is no other article of the Limitation Act, under which we can bring such an application. In this state of helplessness there are but two alternatives before us;—(i) either we must say with their Lordships that “unless there is any limitation provided by the law it is not for us to make one,” and thereby take out an application for mesne profits completely out of the pale of time-limit—a view, which, we apprehend, will offend against the doctrine of Limitation; (ii) or, we must set at nought the decision of the Full Bench,—a task too stupendous for a lawyer to undertake.

The Full Bench case of I. L. R. 19 Calc. 132 has held that in order to make the provisions of Art. 181 applicable, the application must be of such a nature that the Court would not be bound to exercise the powers desired by the applicant without such an application being made at all, and in holding so it has approved of two earlier cases, namely, *Kylasa v. Ramasami*, (2); and *Vithal Janardan v. Vithojirab* (3). This principle is no doubt very sound, and seems to have been acted upon in a very recent case, *Madhabmoni v. Pamela Lambert* (4). But this abstract principle should be applied with

(1) (1897) I. L. R. 25 Calc. 203.

(2) (1881) I. L. R. 4 Mad. 172.

(3) (1882) I. L. R. 6 Bom. 586.

(4) (1910) 12 C. L. J. 328; I. L. R. 37 Calc. 796.

considerable circumspection and scrutiny, otherwise, as we have suggested, very embarrassing consequences will follow. Apart from the ruling of the aforesaid Full Bench case let us see how far the above principle will apply to the case of an application for the assessment of mesne profits. Now, O. XX, R. 12 does not definitely say who is to take the initiation in the matter of an enquiry for mesne profits. It simply empowers the Court to pass a decree for mesne profits, or to direct that an inquiry be made for the purpose. But where a Court has deliberately omitted to take the initiative in the matter, may we not maintain that it then becomes compulsory for the decree-holder to put in his application? The procedure recommended by the Full Bench is that after passing the preliminary decree the Court should fix an early date for the desired inquiry. This procedure though not disapproved, has however been left, by the Legislature, to the discretion of the Court. So it will not be wrong to maintain that when the Court has refused to exercise this discretion, no further action can be taken in the matter except on a formal application by the decree-holder to that effect; and that then such an application becomes so much indispensable that without it (to speak in the language of the Full Bench) *the Court would not be bound to exercise the powers desired by the applicant*. If this view be once conceded, we fail to see how the aforesaid principle can be extended to the particular case under discussion so as to suspend the operation of Art. 181. In this connection it may also be contended, as it was contended in *Madhabmoni v. Pamela Lambert* (1), that the Limitation Act has not contemplated such an application at all; and in support of this contention reliance may be placed on the Preamble to the Limitation Act of 1908 which states that the object of the Legislature was to consolidate and amend the law of limitation relating to only *certain* applications to Courts. In other words, the Limitation Act does not profess to provide for all kinds of applications whatsoever. This has also been the view of *Balaji v. Kushaba*, (2). As to the correctness of this view we hardly need say anything, as the comprehensive fashion in which Art. 181 has been drafted will be a complete refutation of any such argument.

In order to fully understand the scope of the various proceedings to be taken between a preliminary and a final decree, we should do well to examine the various provisions of the Code relating to the suits which naturally call for dual decrees, for instance, administration suits, partition suits, etc. O. XX, R. 13 makes it incumbent

(1) (1910) 12 C. L. J. 328; I. L. R. 37 Calc. 796.

(2) (1906) I. L. R. 30 Bom. 415.

for the Court in an administration suit to pass an order for accounts and inquiries together with the preliminary decree. Similarly, O. XX, R. 16 and 18(1) make the judicial direction for future action go with the preliminary decree. But from the other rules of Order XX it will be found that the Court may or may not give the direction for further proceeding. This difference in the various suits necessarily implies that in matters in which the Court has been given a discretion the initiation for further proceedings must be taken by the party if the Court has not already been moved of its own accord in that behalf. When the initiation has to be taken by the party, we may safely assert that his application is so much necessary that without it *the Court is not bound to move at all* ; and this view will necessarily take an application outside the pale of the principle of the Full Bench case, above referred to, so as to bring it within the operation of Art. 181. In a very recent case, *Beni Singh v. Barhamdeo* (1) a question was raised whether an application to make a mortgage decree absolute under O. XXXIV, R. 5(2) is an application which comes within the scope of Art. 181 and it was answered in the affirmative obviously on the reasoning that such an application is absolutely indispensable as without it the Court could not proceed to a final judgment. In this case all the foregoing cases (including even the Full Bench case of I. L. R. 19 Calc, 132) have been referred to, and the conclusion arrived at by the learned Judge seems to be very reasonable. A similar view was also taken in I. L. R. 38 Calc., 913. The application for assessment of mesne profits does not substantially differ from that under O. XXXIV, R. 5(2). The only difference between the two is that in the case of mesne profits initiation may be taken both by the Court and the party, while in the case of the other initiation can be taken only by the party. But when the Court has, after exercising its proper discretion, deliberately omitted to take the initiative, the two cases are exactly on a par ; and we, therefore, fail to see why an application for ascertainment of mesne profits should not come within the scope of article 181.

As to the second branch of our enquiry, namely,—Does a second application for assessment of mesne profits lie after a previous application for the purpose has been dismissed or rejected for the decree-holder's laches or for any other reason ?—it may be summarily disposed of by answering it in the negative. Under the old Code much argument was spent over it, and clauses (a) and (b) of the old section 244 which left an application for assessment to be dealt with by the Court in its execution department may be held

(1) (1915) 22 C. L. J. 66.

responsible for the same. But after the aforesaid Full Bench case and its legislative recognition by the removal of the said clauses (a) and (b) from the present section. 47, we can no longer maintain that an application for ascertainment of mesne profits is an application for the execution of a decree; and consequently a Court cannot now entertain a series of successive applications for mesne profits exactly in the same way as it can do in the case of applications for executions. As to the older cases on this point, they have all been superseded by the Full Bench case of I. L. R. 19 Calc. The only two cases decided after the Full Bench decision that treated applications for determination of mesne profits as applications for execution are *Ram Kishore Ghose v. Gopi Kant* (1), and *Upendra Chandra v. Sakhi Chand* (2). Both these cases seem to have laid down a rule of law quite inconsistent with the decision of the Full Bench in *Puran Chand v. Roy Radha Kishen* (3); moreover the case of 7 Calcutta Law Journal seems to have been decided in complete ignorance of the Full Bench decision. Therefore as authorities they have no value; nor can they now even furnish a line of argument as the old law under which they were decided has been completely altered by the present Code.

Once an application is made to the Court inviting it to determine the amount of mesne profits, and the same is dismissed or rejected for whatever cause, the whole suit ceases to be pending before the Court; and there being no case pending no further application can be made therein. In fact such a dismissal or rejection amounts to a dismissal of the claim for mesne profits, and is equivalent to a decree. The only remedy open to an aggrieved party in such a case is by way of a review or an appeal against the decree. The law on this point has been very clearly set forth by Justice Sir Asutosh Mookerjee in a very recent case, *Upendra Chandra v. Sakhi Chand* (4). After this case, we hope, no further trouble will again arise in this matter.

A. C. Ghose,  
Vakil.

(1) (1900) I. L. R. 28 Calc. 242.

(2) (1907) 7 C. L. J. 301.

(3) (1891) I. L. R. 19 Calc. 132.

(4) (1912) 16 C. L. J. 3.

## REVIEWS.

**Sanjiva Row's All India Digest Criminal 1836-1915,** 2nd Edition Vol. II. 1916, Law Printing House, Madras, 1916 :— This completes the new edition of the criminal section of the well-known All India Digest by the late Mr. Sanjiva Row. The Digest has been revised throughout, considerably enlarged and brought up to date. There is a valuable nominal index of cases at the end which enables the searcher after precedent who knows one case on a point to trace out all the others relevant to the same point. The statements of the substance of the decisions are clear and concise and account appears to have been taken of all important *Obiter Dicta*, which however condemned are invaluable from the point of view of the practitioners. Notwithstanding the scarcity of paper and the rises in price of printing materials the get-up is excellent and the price moderate.

**Sanjiva Row's Digest of Privy Council Rulings** 3rd Edition Vol. II. edited by C. S. Somañath Sastri, Law Printing House, Madras, 1916.—This is the concluding volume of the invaluable Digest of Privy Council Rulings prepared by the late Mr. Sanjiva Row. The Digest comes down to the end of 1912 but a supplement has been added which brings it down to the end of 1915. It is therefore absolutely up to date. To the analysis of each case there have been added notes to show how the case has been applied or illustrated in subsequent decisions. The work extends over nearly 2300 pages but will repay the labour of a careful perusal. Nothing in the volumes can be treated as wastage because every decision of the Judicial Committee is binding upon Indian Courts to the extent that it has not been superseded by subsequent legislation. The index covers more than 300 pages and is a complete guide to the contents of the volumes.

**The Indian Decisions New Series High Court Reports, Bengal** Vol. II, Law Printing House, Madras, 1916.—This volume reproduces verbatim contents of Vols. 3 and 4 of the Bengal Law Reports with brief notes of subsequent decisions. The contents inspire the feeling that there were giants amongst the Judges of that period.

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# The Calcutta Law Journal.

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## PARENTAL RIGHTS.—(Contd.).

### IV.

While we have talked of the parental right to control the child's religious education as if it were a joint right of both parents, the power to exercise it was in fact vested in the father. Although the mother might be entitled to reverence and obedience from her children, she had no power over them. During her husband's life-time she had no right to her children's custody, nor could she interfere with their education (1). As we have already pointed out, after his death her rights were not greatly increased even though she became guardian (2). If the widow happened to be of a different religious faith from that of the husband she was not only bound to educate her children in the religious faith of the deceased father rather than her own, but to insure that result the court did not hesitate to appoint persons of his religion to act with the mother as guardians (3). It was only when her husband either abdicated or forfeited his rights, and thereupon the mother in fact had assumed the direction of the children's religious education, that the mother could exercise any legal control over the choice of her children's religion. It followed from this that when domestic quarrels resulted in separation of husband and wife she was legally helpless to assert any preferences in respect to her children's religious training.

(1) *In re Agar-Ellis*, 24 Ch. D. 317 (1883).

(2) *In re Scanlan*, L. R. 40 Ch. D. 200 (1888); *In re McGrath*, [1893] 1 Ch. 143; *Petre v. Petre*, 7 Ves. 403 (1802); *In re Browne*, 2 Ir. Ch. 151 (1852); *Austin v. Austin*, 34 Beav. 257 (1865).

(3) *In re Scanlan*, L. R. 40 Ch. D. 200 (1888). A Canadian Court, however, refused to follow to this extreme. In adjudging the mother entitled to the custody of a daughter after the father's death, the Court said:

"The religious question does not enter into consideration in this matter, because the mother, having a right to bring up her child, has a right to decide what religious teaching she shall receive." *Ex-parte Ham*, 27 L. C. Jur. 127, 128 (1883).

"Although the wife may have obtained a decree of judicial separation, the Court will not give her the custody of the children if she intends to bring them up in a religion different from that of their father, and different from that in which they have been educated during the cohabitation of their parents. \* \* \* \* If the marriage had continued undissolved, and the husband and the wife had continued to live together, she would not have been able to control the husband otherwise than by her example and influence, as to the religious education which should be given to their children." (1)

A mother of an illegitimate child controls the religious education of such child. (2)

## V.

Even when both parents are in accord in their views respecting the religious education of their children there must necessarily be cases where their efforts will be frustrated. The court can do nothing more than order a child to be brought up in a particular religion. No order can be made forcing the conscience of the child to accept any designated doctrines. Usually it is considered that the child's religion is controlled by the appointment of guardians or custodians of a particular religious belief confident that the religious surroundings of the child are really the determining factor.

There must occur the very practical and interesting *quere* : how far the court will protect the parents against proselytizing influences brought to bear directly upon the child from outside.

There are as yet no authoritative decisions on this question. Three cases have been found, unfortunately all not agreeing, in dealing with this problem. *Re Lyons* (3). A daughter of Jewish parents, when 18 years of age, was induced by others to leave home and be baptized a Christian. The father had attempted to get possession of the child by force. He was restrained from retaking the child other than by legal proceedings. *Todd v. Lyons* (4). Mr. Vice Chancellor Malins ordered the superior of a monastery to refrain from admitting a young man of 17 to monastic vows against the father's consent, and directed that he be delivered back to the father. *Iredell v. Iredell* (5). Mr. Justice Kay granted an injunction res-

(1) *D'Alton v. D'Alton*, L. R. 4 P. D. 87, 88 (1878).

(2) *Bernardo v. McHugh*, [1891] A. C. 388; *King v. New*, 20 Times L. R. 583, affirming s. c. ante, 515 (1904); *Regina v. Bernardo*, 58 L. J. (Q. B) 522, (1889).

(3) 22 L. T. 770 (1869).

(4) Unreported, see Simpson, *Law of Infants*, 3 ed., 127.

(5) 1 Times L. R. 260 (1885).

training certain persons from communicating with a minor where they had been having secret interviews with her to induce her to adopt their religion instead of her father's.

Logically, unless justified on other grounds, *Re Lyons* must be erroneous. If the parents have the legal right, or even a trust to discharge, to inculcate some proper religious training in the minds of their children, in so doing they have the right to be free from the officious meddling of strangers no matter from what highly disinterested motives such interference may be inspired.

## VI.

In the United States the constitutional limitations (1) against any established religion have fortunately suggested a different judicial approach to religious litigation.

"In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

The result is that our courts have been remarkably free from litigation over the religious education of children. It is only in very recent years that it is beginning to make its appearance. Most of the states—even a state so important as New York—are still without any decisions on the subject from a court of last resort. Such litigation as has arisen has either been decided by side-stepping the religious aspects of the controversy altogether and resting the decision on some other grounds entitling one or the

(1) U. S. Const., First Amendment.

Practically every state constitution has a provision to insure religious liberty and equality before the law of all religions. Thus in Massachusetts :

"It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience ; or for his religious profession of sentiments ; provided he doth not disturb the public peace, or obstruct others in their religious worship". Mass, Const., pt. 1, art. 2.

".....all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law ; and no subordination of any one sect or denomination to another shall be established by law." Amendment XI, Mass. Const. see Stimson American Statute Law, Secs. 40, 42, 43.



other party to custody of the infants, or, too often, in more or less slipshod fashion the court has treated the matter as if it were a novel issue to be decided as law of first impression, or has fallen into an indiscriminating citation of an English authority to justify some particular disposition of the case under consideration. In recent years, as the minority religious groups have strengthened themselves they have more aggressively asserted a right to protect from proselytism the children of their faith who come before the courts for disposition usually as defendant, delinquent, or neglected children. Generally, however, these efforts have been directed toward securing legislative enactment imposing limitations upon the courts or public authorities in the indiscriminate placing of children of some particular faith in conflicting religious surroundings.

The divergence between the standards of American courts is perhaps illustrated by a contrast of three cases. First, a Florida court adopted a rule that "It is not enough to consider the interest of the child alone. And as between father and mother, or other near relation of the child, where sympathies of the tenderest nature may be confidently relied on, the father is generally to be preferred"; that the father has the legal right to have his children educated in any religious faith that he sees proper whose tenets do not inculcate violations of law. The Massachusetts court announces as its fundamental doctrine that "the court will not itself prefer one church to another, but will act without bias for the welfare of the child under the circumstances of each case."—"The wishes of the parent as to the religious education and surroundings of the child are entitled to weight; if there is nothing to put in the balance against them, ordinarily they will be decisive. If, however, those wishes cannot be carried into effect without sacrificing what the court sees to be for the welfare of the child, they must so far be disregarded."

In the third case—in *Wyoming*—it was held that in view of the statutes prohibiting distinctions being made on account of religious belief in awarding custody of minor children, "religious considerations will not be given "the slightest weight in our decision," although "some reputable courts" have considered such differences of religion. This almost goes to the extremes of a Victoria court which ordered a minor placed at an institution where she might have experience of both the Catholic and Protestant religions so that she might be able to have "a free means of exercising her own judgment" until ultimately she adopted some fixed views.

As the law develops in American jurisdictions it will probably

enlarge the mother's authority over her children's religious education. It is to be expected that it will be recognized that it is equal to that of the father. As between father and mother, any religious question respecting the child's religion will be settled by the award of the right of custody. Already it is safe to predict that if the question of the right and duty of a surviving mother concerning the religious education of her child should arise the courts will probably follow the Canadian case rather than the English authorities and hold that where the surviving mother has the right of custody she has a right to dictate the religious teachings the child shall receive irrespective of any question of the father's religion or his possible wishes on the subject.

A desirable American innovation in the not unusual domestic religious situation in many of these cases has already been promulgated by the New Jersey Court. It was held that in the absence of any expressed preference and direction by a deceased father as to the religious education of his child, the clearly expressed wishes of a deceased mother should be followed.

The Missouri Court had a more startling and more novel proposition presented to it in an attempt to obtain an injunction to compel a father to baptize his child in accordance with an antenuptial contract with the deceased wife. It was, of course, refused.

To the very limited extent that they have as yet considered the subject, the Courts seem to have allowed an examination of the child in these cases.

It is evident in view of the paucity of authority on this subject in the United States that a thorough understanding and analysis of the English decisions in the pioneer American cases will enable our courts to avoid difficulties and false standards that will only confuse and increase a troublesome class of litigation that is now beginning to force itself on the attention of our judges.

*(To be continued.)*

## AMENDMENT OF THE RULES OF THE HIGH COURT.

(CIVIL APPELLATE JURISDICTION.)

### *Notification.*

The following rules and amendments in the rules are made by the High Court in exercise of the powers vested in it under clause 37 of the Letters Patent, 1865 (24 and 25 vict., c. 104):—

1. *Insert* the following after the second proviso to Rule I, Chapter II, Part I, page 7 of the Rules of the High Court, Calcutta, Appellate Side, 1914:—

“(3) Provided further that it shall be competent for the Registrar to deal with all matters coming under the head of Lawazima or reports by the Deputy Registrar as specified in clause (1) of the subjoined schedule.

It shall also be competent to the Registrar to deal with—

(a) Applications to dispense with copy of judgment under Order 41, Rule I (1), Civil Procedure Code, and Chapter VIII, Rule III, of the Rules of Court.

(b) Applications in Appeals from Appellate Decrees to receive copies of judgment and decree of the first Court after the expiry of the time prescribed for the institution of the appeal.

(c) Requisitions by Subordinate Courts for documents and records.

Nothing in these Rules will be deemed to authorise the Registrar to make an order of dismissal of an appeal for default or to entertain applications for revival or abatement of appeals (after the expiry of the period of limitation prescribed therefor), or to determine disputed questions of representation under Order 22, Rule 5, Civil Procedure Code, or to pass final orders on contested applications for appointment or removal of next friends and guardians *ad litem*.”

II. The above rules and amendments in the rules shall take effect from the 16th August, 1916.

By order of the High Court,

HIGH COURT,

H. M. VEITCH,

*The 11th August, 1916.*

*Registrar.*





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## THE JUDGES OF THE HIGH COURT AT CALCUTTA IN 1865.

Among recent acquisitions in the Imperial Library at Calcutta is a photographic print designated "The Judges of the High Court at Calcutta in 1865." It attracted the attention of Sir Asutosh Mookerjee, the President of the Council of the Library. He caused an enlargement of the print to be made and presented it to the University Law College, where it has been placed in the Library so as to be daily seen by the students. The print is obviously of considerable interest to the members of the legal profession and we have much pleasure in presenting a copy to all our readers.

If we may say so without impropriety, the fifteen Judges who appear in the print represent a combination of legal talent, scarcely, if ever, repeated in the history of the Court. The most conspicuous figure is that of the great Chief Justice Sir Barnes Peacock, the last Chief Justice of the Supreme Court and the first Chief Justice of the High Court, who, by his profound learning and fearless independence, created a tradition for the Court. Charles Binny Trevor, who joined the High Court from the old Sudder Dewany Adawlat and officiated as Chief Justice, proved himself more than a match for even Sir Barnes Peacock himself in the celebrated Rent Case. The other members of the Civil Service who appear in the print are George Loch, Henry Vincent Bayley, Charles Steer, Francis Baring Kemp, Walter Scott Seton-Karr, George Campbell, Elphinstone Jackson and Frederick Augusta Bernard Glover. Of these, George Campbell left the Court on the

27th November, 1867 to take up the appointment of Chief Commissioner of the Central Provinces, and subsequently came back to Calcutta as Lieutenant Governor of Bengal. Amongst the Barrister Judges, John Paxton Norman (of Hurlstone and Norman's Exchequer Reports) officiated as Chief Justice on three occasions and died by the hand of an assassin on the 21st September 1871. Walter Morgan was appointed the first Chief Justice of the High Court of the North West Provinces established in 1865. John Budd Phear left the Court in 1876 to assume the office of Chief Justice of Ceylon. Arthur Macpherson officiated as Chief Justice and subsequently held a high legal appointment in England. Sambhu Nath Pandit, the first Indian to sit as a Judge in any High Court, died on the 6th June 1867. The names of many of these Judges are still affectionately remembered by the oldest men in profession, and their memory is venerated for their high judicial qualities. The list includes eight of the thirteen Judges who took their seats on the day the High Court was opened on the 1st July 1862; these were Peacock C. J., Trevor, Bayley, Steer, Norman, Morgan, Kemp, and Seaton-Karr, JJ. It also includes Loch J., who was one of the foundation Judges but did not take his seat till 4th December 1863. One misses the figure of Louis Stuart Jackson J., who was one of the foundation Judges but was evidently absent from Court when the group was photographed. It is impossible to determine the exact date of the photograph. But it must have been on some date after 2nd March, 1865, when Levinge J. (who does not appear in the print) died and before 23rd November, 1865 when Steer J. (who appears in the print) retired. A closer approximation is, perhaps, possible, when we take into account the fact that Sir Barnes Peacock was absent from 9th August to 10th September 1865, when Trevor J., officiated as Chief Justice. The print was most probably made between 3rd March and 8th August, 1865.

## LAND TENURE IN ANCIENT INDIA.\*

## THE HINDU PERIOD

"The problem of Indian rent" writes Sir Henry Maine, "cannot be doubted to be of great intricacy. To see this, it need only be stated that the question is not one as to custom in the true sense of the word; the fund out of which rent comes has not hitherto existed, and hence it has not been asserted on either side of the dispute that rent (as distinct from Government revenue) was paid for the use or occupation of land, before the establishment of the British Empire, or that if it was paid, it bore any relation to the competition value of cultivable soil," and he asks the question, "what vestiges remain of ancient ideas as to the circumstances under which the highest obtainable rent should be demanded for the use of land?" He quotes '*Leuchus Mor*,' 159 as containing the most distinct ancient rule, according to which "the three rents are *rack-rent* from a person of a strange tribe, a *fair rent* from one of the tribe, and the *stipulated rent* which is paid equally by the tribe and the strange tribe." Thus from none of the members of the village community (apart from express agreement) could any rent be required, but a rent fair according to received ideas, or in other words, a *customary rent*. It was only when a person, totally unconnected with the class by any of those fictions explaining its miscellaneous composition, which are doubtless adopted by all primitive groups, came asking for leave to occupy land, that the best bargain could be made with him to which he could be got to submit." (1) Thus there were (a) *contract rent* which would apply equally to the same as well as a stranger tribe; (b) *customary rent* applying to one of the same tribe; (c) *competition rent* or *rack rent* for one of different tribe.

Ancient theory of rent.

Applying this principle to the ancient village community of India we have contract rent both for the permanent and non-permanent tenants, customary rent for the permanent tenants alone, and competition rent for the temporary tenants only. Thus from none of the permanent tenants could any rent be required, but a rent fair according to received ideas, or in other words a *customary rent* (2) which could not be raised, [but which was higher than the rate of the other class of cultivators, (3)] in consequence of there

Rent paid by them.

\* Continued from Vol. XXIII p. 28n.

(1) Maine's *Village-Communities*, 180.

(2) Maine's *Village-Communities*, 187.

(3) Campbell's *Cobden Club Essay*, 157; *5th Report*, Vol. I, 14.



being want of competition for land (1) but merely competition for cultivators. And besides, being bound to keep up cultivation to the full extent, they were bound to cultivate in the customary way (2).

Some authorities are of opinion that their holdings however were not *transferable*. Thus Mr. Shore says :—"On the whole I do not think raiyats can claim any right of alienating the lands rented by them by sale or other modes of transfer" (3). And both Harington (4) and Sir George Campbell (5) agree in this. This was because *transferability was not an incident of proprietary right in those ancient times*.

This must have been the case in very early times. For we find in the Buddhist period or at least as early as the reign of Emperor Chandra Gupta, that lands were as easily saleable as moveable properties. And the only restriction was that the tax-paying cultivator could mortgage or sell their lands *only among themselves*. So persons who enjoyed revenue-free lands could mortgage or sell such lands only to those who deserved, or were already endowed with, such lands. It does not appear that any violation of this rule invalidated the sale or transfer actually held, for the only penalty presented was that "otherwise the sellers were only liable to a fine." In case of sales lands were put up to auction publicly in the presence of forty persons who owned properties in the vicinity. The auction was held by an officer of the King (called प्रतिक्रीडा) and the purchaser had to deposit the sale price and a *toll* on the purchase money with the King's Treasury (6). It must, however, be borne in mind that land being owned by joint families, their heads only, acting on behalf and in the interest of the families, could sell.

Their holdings were also *heritable*.

Rights of temporary tenants.

The rights of the other class of tenants or those who were mere sojourners in the village or cultivated lands there while living in neighbouring villages, were of an uncertain and precarious description, which were left to be settled by *contract* and were hardly allowed to come under the higher protection of custom (7). They were mere *tenants-at-will* or more usually from year to year, but sometimes for fixed periods (8). But they *could not be ousted* between sowing and

(1) *Campbell's Cobden Club Essay* 164 : *Directions for Revenue officers*, 41. The Great Rent case,—B. L. R. Sup. 253, 279, 295, 296.

(2) Fifth Report Vol. I, 164 ; *Directions for Revenue officers*, 274.

(3) *Extracts* from Harington's Analysis, 131 ; 5th Report, Vol. I, 164.

(4) Harington's *Analysis*, Vol. III, 450 ; Thomason's *Selections*, 478.

(5) *Campbell's Cobden Club Essay*, 170, 171.

(6) *Kautilya's Arthashastra* Book III. Chapter IX.—ज्ञाति सामन्तधनिकाः क्रमेण भूमि परिवहान् केतुमभ्याभवेयुः विक्रय प्रतिक्रीडा शुल्कं दद्यात्

(7) Phillip's *Land Tenure*, 23.

(8) Phillip's *Land Tenure* 22.

harvesting (1). They had to be attracted by favourable terms. And not having their habitations in the village, they were not so amenable to pressure, and could at any time abandon the land for which they had no particular attachment. They therefore generally made more favourable terms and paid lower rates than the permanent tenants (2). In course of time as the competition for land increased, these raiyats had to pay generally higher rates than the resident raiyats (3). But though their interest was uncertain and precarious they could obtain a permanent interest in the soil by *settling* as permanent inhabitants in the village, and establishing themselves as members of the village community ready to undertake their shares in the responsibilities attaching to that position. The disposition to become permanent settlers could hardly be satisfactorily proved without some length of *possession*. Accordingly those who had settled in the village for more than one generation were generally considered to have sufficiently shewed such intention, and such settlers became then recognised as *settled raiyats* of the village.

It seems that *subletting* was<sup>4</sup> originally unknown. The early Aryan conquerors of India were an agricultural and not a pastoral race. They called themselves *Aryas*, meaning cultivators, as distinguished from the aborigines of the soil and took pride in the art of cultivation in which they excelled. The hymns of the *Rig Veda* sing many songs in praise of this occupation. It was not a disgrace then to hold the plough. But this state of things could not last long. Either from necessity, or from indolence, or an abundance of *Sudra* labourers, sub-letting soon became common. The primitive state of society which gave the first occupier a right to continue in occupation and no more, could not possibly last long. Complications must arise and did in fact arise, and Hindu Sages had to grapple with the relations which the more developed state of things required them to deal with. Even in so early a period as the days of *Apastamba* we find that the lands were leased as in the present time (4). And although *Manu* and *Yajnavalkya* do not deal with the matter as we expect them, *Parasara* and *Narada* (5) deal copiously with the questions arising out of the relationship between landlord and tenant. *Kautilya* in his *Artha Sastra* lays down that in the case of a land-owner unable to cultivate his lands another might do so on a five years' lease at the expiry of which he had to

Sub-letting.

(1) *Land Tenure* by a Civilian, 82.

(2) Field's *Introduction* to Regulations, 33. Ibid, *Land holding*, 425.

(3) Finucane and Amir Ali's *Introduction* to Bengal Tenancy Act, 1st Ed. 4.

(4) *Apastamba* II. 11, 28.

(5) *Narada*, Chapter XI.

surrender the lands after obtaining a compensation for his improvements on the same (1).

Tenure held by joint families..

There can be little doubt that tenures in primitive times were tenures *held in common* by a group of kinsmen with the eldest male member of the family at the head. This was the joint family which then formed, as it does now, the unit of the Hindu society. The Hindu race moved in families colonised as well as conquered the country. The immigrants when they came into the village came with their families, the heads of which obtained leases of lands which they cultivated and on a portion of which they built their houses and settled with their families.

In separate ownership.

As a general rule, the great field (of the village) was divided into plots corresponding in number to that of the heads of the houses in the villages ; and each family took the produce of its share. It is a fair conclusion from the evidence that the system of *separate holdings* already existed in early Vedic times (2). But the holdings belonged not to individuals but to the joint families, as we have already stated. Very often a family on the death of a house-holder would go on as before under the superintendence of the eldest son. If the property were divided, the land was equally divided among the sons.

Common ownership of Irrigation channels.

The fields were all cultivated at the same time, the *irrigation channel* being laid by the community, and the supply of water regulated by rule, under the supervision of the headman. No individual or corporate proprietor needed to fence his portion of the field. There was *common fence* ; and the whole field was surrounded with its rows of boundaries which were also the water channels.

Of grazing field.

And each village had *grazing ground* for the cattle *in common*, no one having separate pasture, and a considerable stretch of *jungle* where the villagers had common rights of waste and wood. *Manu* has laid down that grazing grounds are the common property of the village and the people encroaching upon them are liable to punishment (3). *Yajanvalkya* also lays down the same rule (4). And *Usanas* in enumerating properties not to be divided even among person of the same *gotra* makes mention of the 'field' (5).

(1) Book III. Chapter X :—"अनादित्यमरुतयोऽन्यः पञ्चवर्षाण्युषमुज्य प्रयास-निष्क्रीयेनदद्यात् ।"

(2) Macdonell and Keith's *Vedic Index of Names and Subjects* under *kshetra* and *urvara* : Rhys David's *Buddhist India*, 45-47.

(3) *Manu*, Chapter VIII.

(4) *Yajnavalkya* Bom. Ed.

(5) Quoted in *Mitakshara* Chap. I, Sec. 4, Para. 26.

"अविभाज्यं सगोत्राणामा-संज्ञकजलादि ।

याज्यं चैवञ्च पञ्च लताश्च सुदक्षस्त्रियः ॥"

*Cultivation* of land was in those early days very strongly insisted on and the sages ordain an obligation on the part of the holders of the lands to cultivate the soil and prescribes penalties for non-cultivation. Thus *Manu* says :—"If land be injured by the fault of the farmer himself, as if he fails to sow it in due time, he shall be fined ten times as much as the king's share of the crop, that might otherwise have been raised, but only five times as much if it was the fault of his servants without his knowledge" (1). We find *Apastamba* laying down that if a lessee of land does not exert himself, and the land bears no crop in consequence, he is bound to pay the value of the crop that ought to have been grown on the land leased (2). *Vyasa* says :—"If a man after taking a field with the object of cultivating it fails to do so, either himself or through the agency of others, he should be made to pay to the owner a proportionate share of the corn which the field could have yielded if it were cultivated and, in addition, a fine to the King (3). To the same effect is the injunction of *Yajnavalkya* as will appear from the *sloka* quoted below (4). And when a field is abandoned by its owner and the same is cultivated by another without opposition, the cultivator is entitled to the whole of the produce and the owner would not get back the land without paying the cost of clearance and cultivation. This is the rule laid down by *Narada* (5). The *Artha Sastra* of *Kautilya* contains the rule that in the case of a land-owner unable to cultivate his lands, another might do so on a five years' lease. But an absentee landlord who was obliged to sojourn abroad for a time did not forfeit his land though it remained uncultivated (6).

Obligation to cultivate.

It is not easy to determine the *mutual relations of the village-community* and its component parts—the several *families*—with

Mutual relation between village Community and families.

(1) *Manu*, Chap. VIII. 243 :—

“क्षेत्रिकस्याख्ये दण्डोभागाद्दशगुणो भवेत् ।

ततोऽर्द्धं दण्डोभृत्यानामज्ञानात् क्षेत्रिकस्य तु ॥”

(2) *Apastamba* II. 11, 28 &c.

(3) *Vyasa* quoted in *Vivada Ratnakar* :—

क्षेत्रं गृहीत्वा यः कञ्चित् न कुर्यात् न च कारयेत् ।

स्वामिने तत् फलं दाप्यो राज्ञं दण्डञ्च तत्समम् ॥

(4) *Yajnavalkya*, Bom. Ed. 218 :—

कालाहृतमपि क्षेत्रं श्रो न कुर्यात् न कारयेत् ।

स प्रदाप्येऽल्लष्टफलं क्षेत्र मनस्ये न कारयेत् ॥

(5) *Narada*, Chap. XI. 24 :—विरुध्यमाने क्षेत्रे चेत् क्षेत्रिकः पुनरावर्जित् स्विकीपचारं तत्सर्वं दत्त्वा क्षेत्रमाप्नुयात् ।

(6) Book II, Chapter X.

regard to land. But sufficient evidence exists for the presumption that the village-community had a large degree of control as to the occupation and cultivation of the village lands. Sir Henry Maine points out :—"Each family had the duty of submitting to the common rules of cultivation and pasturage, and of abstaining from sale or alienation without the consent of the co-villagers, and ( according to some authorities ) of refraining from imposing a rack-rent upon the members of the brotherhood." (1). Referring to the authority of Laveleye we find that the village-communities of all countries were averse to the alienation of land to strangers. "No one"—he says—"could sell the property to a stranger without the consent of his associates, who always had a *right of pre-emption*" (2). This rule has its prototype in the records of our ancient law. Thus the *Mitakshara* (3) quotes an anonymous text which lays down that the consent of the village is necessary for the alienation—sale or mortgage. This appears also from the other texts quoted below (4). *Kautilya* in his *Artha Sastra* lays down that the tax-paying cultivator could mortgage or sell their lands *only among themselves*, otherwise the seller was liable to a fine (5). The members of the community thus had a sort of right of pre-emption, so as to keep the land within their own body. But these and similar customary rights which the village communities had, can hardly be construed as showing that the entire land occupied or cultivated by the villagers was considered to be common property (6). Thus there was no such proprietary right against the community as we are accustomed to.

*Radha Raman Mukerjee*

Berhampur.

(To be continued.)

(1) Manu's 'Early History of Institutions,' 82.

(2) Laveleye's *Primitive Property*, 118.

(3) *Mitakshara*, Chapter I, Section 1. 31 :—

“स्वयामञ्जाति-सामन् दायदाशुमतेन च ।

हिरण्योदकदानेन षड् भिषाच्छति मेदिनौ ॥”

(4) *Vrihaspati* cited in *Mitakshara* Chapter I, Section 1, 30 ;

*Usanas* cited in Do. Chapter I, Section 4, 26.

“यत्पुत्रस्य चेतस्य अविभाज्यत्वमुक्तं ।

(5) Book II. Chapter X : *Ante*.

(6) Sarada Charan Mitra's Tagore Law Lectures on 'The Land Law of Bengal,' 18.

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## LAND TENURE IN ANCIENT INDIA.

### THE HINDU PERIOD.

(Concluded).

Each of the villages was under its own headman, who is referred to in the *Rigveda* and often in the *Samhitas* and the *Brahmanas* as the '*Gramani*' or the leader of the village (1). Elphinstone is quite right in thinking that he is referred to in *Manu* as the '*Gramadhipati*' or the lord or superintendent of the village (2). Originally he derived his right to the office *through his descent* from the founder of the village (3). Rhys Davids (4) thinks that he was at first *elected* by the village council or a hereditary officer, and the appointment is only claimed for the king in later authorities (5). But there is not even so much authority for election or heredity. The post may have been sometimes hereditary and sometimes nominated or elective (6). But considering the strong tendency of all Hindu offices to become hereditary, the office of the headman had probably acquired a *hereditary* element in very early times (7).

Village headman.

Presumably there must have been many '*gramanis*' or *gramadhipatis* in a kingdom, and in considering their functions we shall arrive at some understanding of the revenue system of the Hindu Government, and of the mutual relation between the king and the community. The exact meaning of the title is not certain. By

His functions.

(1) MacDonell and Keith's '*Vedic Index of Names and Subjects*' under *Gramani*.

(2) *Manu*, Chapter VII. 115.

(3) *Fifth Report*, Vol. I, 18.

(4) Rhys Davids '*Buddhist India*,' 48. (5) See *Manu*, Chapter VII, 115.

(6) See (1) above.

(7) Campbell's *Cobden Club Essay*, 169 (226) ; Patton's *Asiatic Monarchies*, 81 ; *Land Tenure* by a *Civilian* 33, 76.

Zimmer, the '*gramani*' is regarded as having had military functions only (1) and he is certainly connected with the '*senani*' or the leader of an army. But there is no reason to restrict the sense. Presumably he was the head of the village both for civil purposes and for military operations (2). But his most important duties were to adjust the revenue of the village and to collect it for the king or the state, and thus he combined the functions of the head of the community with those of an officer or representative of the government (3). He arranged all the details of the assessment ; ascertained the extent of each holding in the village ; estimated the growing crop, caused the threshed corn-heaps to be weighed ; and apportioned the revenue accordingly. He had to see that the cultivation was so conducted that the revenue might not suffer (4). He received the share of the king in food, drink, wood and other articles, which represented the king's revenue, from the villagers and delivered the same in kind to the revenue collector, and himself retained a portion thereof as his own perquisites (5). He paid less than the other cultivators for his own holding. This appears to have been his own remuneration as a servant of the State, and he had other emoluments which were derived from the village and were the payments for his services to the villagers (6).

Officers appointed  
for revenue and  
Police purposes.

The system of collecting the revenue in kind from the head-man of each village was manageable only so long as the domain of the State was limited in extent. As petty States were amalgamated by conquest or otherwise, and as the country gradually approached the condition of a single government under a single sovereign, it became absolutely necessary to change a state of things so primitive and ill-suited to further stages of progress. Hence over these village communities was appointed a *graduated series of officers*, who represented the sovereign in due degree, and the administration of the country for fiscal and other purposes was left in their hands (7).

(1) Zimmer's *Altendesches Leben*, 171.

(2) MacDonell and Keith's *Vedic Index of names and Subjects* under '*Gramani*'.

(3) Harrington's '*Analysis*' Vol. II, 67 ; Campbell's *Cobden Club Essays*, 163 ; *Fifth Report* Vol. II. 13, 157 ; *Land Tenure* by a Civilian 76 ; Robinson's *Land Tenure* 67.

(4) Phillip's *Land Tenure*, 23.

(5) *Manu Samhita*, Chap. VII, 119.

(6) *Ibid*, 30 : *Land Tenure* by a Civilian, 78, 80 : *Fifth Report* Vol. II 13, 76.

(7) *Apastambha*, *Prasna* 11 *Palala* 11 *Kanda* 26 Verses 4—9 : *Manu Samhita*, Chap. VII, 115—120 ; *Mahavarata Santi Parva*, Chap. 1 Sec. 87.

They were a lord of a village (who is no other than the headman of the village just spoken of), a lord of ten villages, a lord of twenty, of a hundred, and of a thousand villages (1). The chain of officers so appointed had territorial jurisdictions within which they were responsible for the collection of the revenue as well as good behaviour of the villagers under them. They collected the King's share of the produce and had also police duties. (2) Each within his own jurisdiction was engaged to repress crimes and report those that he could not repress to his immediate superior (3).

The remuneration of these officers was thus provided for :—“The lord of a single village received in kind the share of the King in food, drink, fuels and the like. Above him, the lord of ten villages received an assignment of land that could be ploughed by two ploughs ; the lord of twenty villages that of “ten plough” lands ; the lord of a hundred, that of a village or a small town ; the lord of a thousand, that of a large town (4). These officers were all placed under a minister at the capital (5). They looked to the headman of the village for the due payment of the King's taxes and for assisting them in the investigation of offences. These officers of the King therefore had all lands attached to or the *revenues of lands appropriated for, their offices*. The offices usually went to the eldest son

Their remuneration.

Assignment of land revenue.

(1) *Manu Samhita*, Chapter VII, 115.

ग्रामस्थाधिपतिं कुर्याद्दशग्रामपतिं तथा ।

विंशतींशं शतेश्च सहस्र पतिमेव च ॥

(2) Max Muller's *India—What can it teach us?* 47 : Elphinstone's *History of India*, Cowell's Edition, 22.

(3) *Manu Samhita*, Chapter VII, Verses 116—117 :—

ग्रामे दोषान् समुत्पन्नान् ग्रामिकः शनकैः स्वयं ।

संसेदग्रामदशेशाय दशेशो विंशतींशिनं ॥

विंशतींशस्तु तत्सर्वं शतेशाय निवेदयेत् ।

संसेद ग्रामशतेशस्तु सहस्रपतये स्वयं ॥

(4) *Manu Samhita*, Chapter VII, 118—119 :—

ग्रामि राज प्रदेयानि प्रत्यहं ग्राम वासिभिः ।

अन्नपानेत्थनादीनि ग्रामिकस्तान्यवाप्नुयात् ॥

दशौ कुलान्तु भुञ्जीत विंशौ पञ्च कुलानि च ।

ग्रामं ग्रामशताध्यक्षः सहस्राधिपतिः पुरं ॥

(5) *Ibid*, ... 120—121 :—

राज्ञोन्मः सचिवः क्षिप्रस्तानि पश्येदतन्द्रितः ।

नगरे नगरे चैकं कुर्यात् सर्वार्थचिन्तकं ॥



and these tenures gradually became hereditary. In course of time these lords of ten, or hundred or other groups of villages became, a class of *aristocracy* between the king and the people and ultimately petty Rajas. But only a few of them could survive the waves of foreign invasion.

Self-Government  
within village.

It may be noted here that the appointment of officers to rule over ten, twenty, a hundred, or a thousand villages means no more than that they were responsible for collection of taxes, and generally for the good behaviour of these villagers. It does not show that the entire country was governed by the central power with a chain of subordinate officers under its control and that there was no trace of self-government among the villagers. In fact the internal government of the village was left to the village community (1). The village was, as we have said before, a corporation managing its own internal affairs. It was ruled by a council of elders, originally called a *punchayet* from the number of its members, and was presided over and represented in its fiscal and many of its other relations, by its headman. It administers justice to its own members as for punishing small offences and deciding disputes in the first instance.

Other cases of  
assignment of land  
revenue.

Then again powerful chiefs or sovereigns for the maintenance of whose power large armies were necessary, were unable to pay them in money, for money did not exist in sufficient abundance; and so they *assigned* to them for their support *the royal revenue* claimable from specified tracts of territory, not infrequently conquered territory, in which as a matter of necessity they were quartered with their leaders, or the assignment was made on a district near which they were already stationed. Similar grants were also made for the maintenance of temples and of holy men, for the reward of public service, and moreover not infrequently in the exercise of royal munificence to favourites. It must be carefully borne in mind that what was assigned in all these cases was *not the land itself*, (for the king had no property in it) *but the right to collect the Government revenue* or the tithe due by custom to the government as yearly tax (2). The grant was made of the *regalia* rather than of land.

Tributary chiefs.

Then there were many petty chiefs who had acquired a local position and influence before they came in contact with a stronger power to which they succumbed and in which they became absorbed. Though not strong enough to resist the absorption, they were yet able to make terms, and retaining their former relation to those

(1) Max Muller's *India—What can it teach us?* 46—47.

(2) Field's *Introduction*, 34—36 :

Ditto *Landholding*, 427—430: Rhys David's *Buddhist India*, 48.

below them, they acknowledged a Sovereign over them by the payment of revenue (1).

Then under the continual succession of wars, invasions, and internecine struggles which mark the history of every province, royal, princely and chieftain's houses were always gaining the lordship of territories and again losing it—gathering head, founding and acquiring dominions, and in time losing them, while the houses lost rank and were broken up. And when any of the greater conquests, like those of the Mughal and the Marhathas powers, occurred, the petty Hindu and other principalities all over the country would go to pieces; cadets of families would break off and assume independence; and territorial rule would be lost, but the family would contrive to cling, by timely submission, and by favour of the conqueror, to relics of its possessions no longer as ruling chiefs.

Then there was another class of persons which is a growth in or over an existing village, or some one man who obtained a grant, or elevated himself by energy and wealth and developed a position out of a contract for *revenue farming*.

Revenue farmer.

In course of time all these classes of persons acquired a local position, influence and importance and their families, taking root in the locality, became the *germ of an aristocracy* between the sovereign, the village communities, and the peasant proprietors, variously known as *Rajas* and *Talukdars* and other names (2).

Rise of aristocracy between sovereign and cultivator.

The rise of the aristocratic class, between the sovereign and the village communities, though it did not make any changes in the internal management of the village, brought about vast *changes in the proprietary rights inside the groups*. The village formerly, as we have seen, contained a number of cultivating families who usually worked the land themselves with the aid of their members, but often employed tenants. The cultivators themselves were practically the *joint owners* of their several family holdings. These holdings were separate units; the cultivators did not claim to be joint holders of a whole area, nor did their holdings represent, in any sense, shares of what was in itself a whole which belonged to them all. They were however held together by their submission to a somewhat powerful headman, and other village officers, and by the use, in common, of the services of the resident staff of village artisans and menials, who received a fixed remuneration on an established

Changes in proprietary right.

(1) Fields *Introduction*, 34—36.

Ditto's *Land holding*, 427—430.

(2) See Baden Powell's *Land Systems of British India*, Vol. I, 129—130 : 148 : Ibid, *Land Revenue in British India* (2nd Ed.) 69—71, 73.

scale, and sometimes had hereditary holdings of service lands. Very often the headman was the person, who had led the party who first established cultivation and founded the village. The Raja had his own private lands ; but as ruler of the whole country, his right was represented, not by a claim to general soil-ownership, but by the ruler's right to revenue, taxes, cesses and the power of making grants of the waste (1).

Its usurpation by  
aristocracy.

As long as the Raja or the chief held a great state as *ruler*, the original title of the soil occupants was not interfered with, either in theory or in practice. The chief remains apart, receiving revenue, levying tolls and taxes, administering justice, with perhaps some vague claim as conqueror to be lord of all, but not claiming any actual concern with the occupied lands in the villages. And in cases of grants, we find that the management of a village, the whole or part of the Raja's grain-share, and the manorial rights (tolls, ferries, local taxes) were made over to the grantee. In the first instance, the grant is not intended to deprive any existing landholder or diminish his right ; it usually makes over to the grantee the state-share of the produce and other state-rights in the village. But the grantee, in course of time, gets such a stronghold in the village that he *regards himself as the owner* of the whole place. He retains or seizes upon villages, and the sense of lordship focussed as it were on the more limited area, become fixed on the land itself, and develops into a claim to be *owner* of the actual acres of the village area. The claim invariably results in the ultimate overshadowing of all preceding rights, and in time these became ignored altogether. The descendants of the grantees forget that the cultivators had any right independent of the lord and they manage to make them forget it too (2). "

Degradation of  
original proprietors  
into tenants.

Thus the grant of the royal prerogatives over the villages so far as fiscal matters were concerned, which were really the grant of *regalia* rather than the grant of land, tended to *depress the position of the actual cultivators and to turn them into tenants*, and gave rise to the view that the *holders of such grants were landlords*. Thus among over the village there arose a landlord or a body of landlords, claiming right over the entire village, intermediate between the Raja or the chief and the humbler body of resident cultivators and dependants. The important feature now is that there is an individual or a family (or a group of ancestrally connected families) which

(1) Baden Powell's *Land Systems of British India*. Vol. I. 132, 134.

(2) Baden Powell's *Land Revenue in British India*, 75 etc.

has the claim to be superior to other cultivating landholders, and in fact to be the *owner or landlord of the entire area* within the ring fence of the village boundary, as already existing or as established by their own foundation. They grew up over an existing body of cultivators whom they allowed to remain as their *tenants*. In this way there grow up landlord and over-lord rights over, and often at the expense of, other rights in land and as time goes on and the dominant grade of landlord confirms its position, the whole of the original landholders tend more or more to sink, along with the landlord's own located tenants and followers, into one undistinguishable mass of *non-proprietary* cultivators. Thus the old land-holding class, who originally had tangible, if not legally secured, rights in the soil, has now sunk into the tenant level (1). And as a matter of fact it was found extremely difficult to draw a line between the tenants who represented the original land-holders and those whose position was really due to contract. The menial and artisans who reside in the village now hold their lands and house sites from these landlords and rendered them the services instead of to the entire villages in lieu of which they originally held them. This change of idea as to the right over land and the status of the different classes and persons interested in its cultivation, though it began in the later part of the Hindu period became an accomplished fact during the Mahomadan period, as we shall see hereafter.

Mr. Baden Powell has very aptly described these villages as the "*landlord villages*" and contrasted them with the older class above described which he has called the "*Raiyatwari villages*" (2) and has pointed out that "in a large number of cases we can positively trace how the former has grown up over the latter which is the older village. Whatever be the date of the "*Laws of Manu*" representing as it does the customs as established in Northern India, there can be little doubt that the only kind of village known to that author is the *raiayatwari* village under a headman with an official free-holding of land (3).

Two types of village—one developed from the other.

*Radha Raman Mukerjee*

Berhampur.

(1) Baden Powell's *Land Revenue in British India* 133—4.

Sir Henry Maine has remarked on the tendency of the recorded revenue-payer of the State to become proprietor (See *Village Communities*, 150, 3rd Ed.)

(2) Baden Powell's *Land Revenue in British India*, 2nd Ed. 74—75.

(3) *Ibid*, 88—89.

### DISTRIBUTION OF THE HIGH COURT BENCHES.

**Sanderson, C. J. and Mookerjee, J.**—Privy Council Department and Appeals from Original Side.

**Woodroffe and Beachcroft, JJ.**—Group II (Burdwan, Hoogly, Bankura, Midnapur and Birbhum), and appeals under order 41, rule 11 of all Groups.

**Fletcher and Richardson, JJ.**—Group III (Rajshahi, Rangpur, Dinajpur, Jalpaiguri, Darjeeling, Pabna, Bogra, Tippera, Noakhali and Chittagong).

**D. Chatterjee and Walmsley, JJ.**—Group I (24 Perganas, Nadia, Jessore, Khulna and Murshidabad).

**N. R. Chatterjee and Newbould, JJ.**—Group IV (Dacca, Faridpur, Bakargunj, Mymensingh, Assam Valley Districts, Sylhet and Cachar).

**Teunon and Chaudhuri, JJ.**—Criminal business.

**Chitty, J. and Greaves, J.**—Original Side.

## REVIEWS.

**Everybody's Year Book with Diary for 1917** by Anandram Newaram Jagtiani—We have received from Mr. Jagtiani a copy of his useful Diary for the year 1917. The book is replete with much general information of great utility to all business men.

**Indian Penal Code**, The Law Printing House, Madras 1916—This is a very handy un-annotated edition of the Indian Penal Code published by the well-known law publishers of Madras. The book will be useful for the students. It contains an elaborate subject Index which will be very helpful to the readers. The get up of the book is excellent.

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